89-436

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

Keene Corporation,

Petitioner,

--v.--

Independent School District No. 622,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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87 pp

QUESTIONS PRESENTED

Petitioner seeks a writ of certiorari granting review of a Minnesota state court decision requiring petitioner to produce documents in state court litigation which are under federal court seal and are absolutely privileged. The following questions would be raised in this writ:

1. Whether the state court violated petitioner's constitutionally protected rights by requiring that petitioner produce documents sealed by a Federal District Court order.

2. Whether the state court's order requiring petitioner to produce documents which are absolutely privileged constitutes a violation of petitioner's constitutional rights to the assistance of its counsel and access to the courts.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were Petitioner Keene Corporation, Respondent Independent School District No. 622, Bor-Son Construction, Inc., Corwin-Sepannen & Associates, Inc., and insulation sales company. The Respondent before this Court includes Independent School District No. 622.

Petitioner Keene Corporation has a single parent corporation, Bairnco Corporation.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

Keene Corporation,

Petitioner,

--v.--

Independent School District No. 622,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

OPINIONS BELOW

The order of the Minnesota State Court was issued on February 2, 1989 and is not reported. The Minnesota Court of Appeals issued a decision on March 22, 1989, which is unreported. The Minnesota Supreme Court issued a decision denying further review on May 24, 1989, which is unreported.

JURISDICTION

Jurisdiction is proper pursuant to 29 U.S.C. § 1257(a) (1988) which provides for review by certiorari of final judgments or decrees rendered by the highest court of a State where "any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." The Minnesota Supreme Court filed its decision in this matter on May 24, 1989. Pursuant to 28 U.S.C. § 2101(c) (1988), petitioner may apply for a writ of certiorari within 90 days after the entry of such judgment or decree.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Due Process Clause, Fourteenth Amendment Supremacy Clause

STATEMENT OF THE CASE

FACTS

This litigation arises from a Minnesota state-court lawsuit concerning the use by Independent School District No. 622 of thermal insulation and acoustical products containing asbestos in the

construction of Tartan High School. Petitioner has never mined asbestos, or manufactured, fabricated, sold, distributed, or otherwise placed into commerce thermal insulation or acoustical products containing asbestos. Independent School District No. 622 ("Respondent"), however, has alleged in its Complaint commencing the Minnesota action that Petitioner is liable for the cost of removal and replacement of these materials. Petitioner denies liability for these costs.

In the course of the state court proceedings, Respondent served numerous discovery requests upon Petitioner. Most of the discovery concerned the activities of Keene Building Products Corporation ("KBPC"), Petitioner's former subsidiary or KBPC's corporate predecessors. Those

companies did, at one time, manufacture and sell thermal insulation and acoustical products, some of which contained asbestos. Petitioner sold its interest in KBPC to a third party in 1974.

On January 4, 1989, Respondent filed a Motion to Compel Production of Documents to which Petitioner had properly objected on grounds of privilege. The documents requested were the subject of the following discovery request:

> Produce any and all documents, exhibits or depositions utilized by any party in the case of Keene Corporation v. Insurance Company of North America (C.A.No. 78-1011 DCDC) as well as a complete index thereto.

The requested documents were generated by Petitioner and its counsel in connection with its defense of other asbestos related litigation and contain

information about Petitioner's strategies, settlement negotiations, and other work product information. These documents also contain attorney/client privileged information. Respondent apparently learned of the existence of these documents because Petitioner had been required to produce them and permit a deposition of its counsel's paralegal, David Rehbein, in an insurance coverage action filed by Petitioner in the United States District Court in Washington, D.C. (the "INA Action"). Petitioner and its insurer produced the documents in the insurance action solely in reliance upon a federal court order sealing the records and in accordance with its insurance carriers' obligations to defend Petitioner. Nevertheless, the school district sought production of these and other privileged

or sealed documents. The documents sought were still under seal by order of the D.C. federal court when requested in the Minnesota action.

On February 1, 1989, Judge J. E. Cass ordered Petitioner to produce the privileged and sealed documents, essentially requiring Petitioner to ignore the federal court order. He ordered Petitioner to comply with the order by January 27, 1989. In his order, Judge Cass did not find that the documents were not absolutely privileged. In fact, he gave no explanation whatsoever for his decision to require that Petitioner produce the documents.

Subsequently, Petitioner filed a Petition for a Writ of Prohibition or, in the alternative, for Discretionary Review in the Minnesota Court of Appeals.

Petitioner's petitions were summarily denied. In its denial of Petitioner's requests for extraordinary relief, the Minnesota Court of Appeals stated that Petitioner could merely produce documents kept in its document center rather than the privileged and sealed documents themselves, apparently not understanding that Petitioner had already made all the document center documents available, and that Petitioner's objection concerned other documents not available in the document center and generated long after any of those stored documents of its former subsidiaries. The Court of Appeals also ignored the fact that the discovery request sought the very depositions and documents belonging to others which were sealed by the federal court and which were not otherwise

available to Petitioner. Finally, the Court of Appeals failed to recognize that there was no challenge to Petitioner's claim of privilege as to these materials. Petitioner sought review of the Court of Appeals' decision by certiorari in the Minnesota Supreme Court but its petition was denied without hearing. Subsequently, Petitioner commenced a civil rights action in the federal district court for the State of Minnesota seeking injunctive relief to prevent the irreparable damage which would result upon enforcement of the state court order. Petitioner also sought to prohibit the state court from requiring Petitioner to violate the federal court's protection order by invoking the federal court's power to protect its own jurisdiction under the Supremacy Clause and the Anti-Injunction

Act. Petitioner's civil rights action was dismissed by the district court in part, in reliance upon Petitioner's right to petition this Court for review of the state court's order. See App. E.

FEDERAL QUESTION

Petitioner raised the issue of the conflict between the federal court's protective order and the proposed state court order in a number of memoranda to the trial court. See App. F. The trial court issued its order without comment on Petitioner's arguments.

The conflict issue was again raised in Petitioner's brief in support of its Petition to the Minnesota Court of Appeals for discretionary review or, in the alternative, a writ of mandamus. Petitioner raised its constitutional due process arguments at this time. See

App. G. The Court of Appeals rejected Petitioner's argument on the conflict issue. It failed to address Petitioner's claim that the trial court's order constituted a deprivation of Petitioner's constitutional due process rights. These arguments were again raised in Petitioner's application to the Minnesota Supreme Court for discretionary review. See App. H. The court summarily denied the petition and did not address the federal questions raised.

REASONS FOR ALLOWANCE OF WRIT

The United States Supreme Court should grant this Petition in order to resolve important issues of federal law. This Court should determine whether a state court may ignore a federal court's protective order and require a litigant to violate that order during state court

litigation. This Court should also determine whether Petitioner's compelling interests in protecting its constitutional rights to counsel and access to the courts require the Court to intervene to prevent the state court from enforcing its improper discovery order. These issues must be resolved now. Once Petitioner is required to violate the Federal court's order and Petitioner's privileged information becomes public, neither money damages nor court order will adequately repair the resulting injury to Petitioner's constitutional rights. The public interest will be served by jealously preserving Petitioner's right to the effective representation of its counsel in state court. Consequently, this court should grant Petitioner a Writ of Certiorari.

I. This Court Should Intervene To Prevent the Deprivation of Rights Protected by the U.S. Constitution

Petitioner seeks review by Writ of Certiorari because the state court order directly infringes on its constitutional due process rights to assistance of counsel and access to the courts. If Respondent gains access to Petitioner's privileged materials, the damage to Keene's constitutional rights will be immediate and irreparable.

A. The Right To Assistance Of Counsel

The state court order, which requires the disclosure of documents containing both confidential attorney-client communications and counsel's trial preparation materials, violates Petitioner's constitutional due process right to assistance of counsel. A civil

litigant has a due process right to the assistance of counsel. See Maness v. Meyers, 419 U.S. 449, 471-72 (1975) (Stewart, J., concurring); Powell v. State of Alabama, 287 U.S. 45, 69 (1932). See also Martin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982) (a civil litigant has a right to the effective assistance of counsel); Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1117-19 (5th Cir.), cert. denied, 449 U.S. 820, 101 S. Ct. 78, 66 L. Ed.2d 22 (1980) (the right to the advice and assistance of retained counsel in litigation is implicit in the concept of due process); Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (government cannot deny welfare recipients the right to secure for themselves representation of counsel); Roberts v. Anderson, 66 F.2d 874, 877 (10th Cir.

1933) (the right to be represented by counsel is a substantial one); McCuen v. Texas Power & Light Co., 714 F.2d 1255, 1262 (5th Cir. 1983) (right to counsel in civil cases is no less fundamental than same right in criminal cases).

The right to counsel in civil cases rests on the principle that, without the assistance of counsel, the constitutional guarantee of a fair hearing may be rendered meaningless. See Powell v. Alabama, 287 U.S. at 68. See also Goldberg v. Kelly, 397 U.S. at 270 (right to be heard of little avail if it does not comprehend right to be heard by counsel); Roberts v. Anderson, 66 F.2d at 876 (right to a hearing as essential of due process includes right to assistance of counsel of own choice). In ordering Petitioner's attorneys to produce

documents containing confidential attorney-client communications and counsel's trial preparation materials, the Minnesota court has directly infringed on Petitioner's constitutional right.

The order which demands the production of these materials is tantamount to compelling an attorney to testify as to how the attorney prepared the case. The subject of the depositions at issue is the handling of Petitioner's defense in asbestos related litigation. The witnesses discuss communications between Petitioner and its counsel, communications among counsel, defense strategy sessions and the role of Petitioner's national counsel, including the organization and handling of the many asbestos cases, case evaluation and

settlement negotiations. The protection of the matters addressed in the coverage action depositions from discovery by adverse parties is at the heart of the attorney-client privilege and the attorney work-product doctrine. If Petitioner's confidences and its attorney's strategy discussions were subject to discovery by adverse parties in the many asbestos cases, counsel could not possibly provide effective representation to its clients. Similarly, if the coverage action materials at issue here are to be produced to plaintiffs in the underlying cases, Petitioner faces a draconian choice: it can either abandon its efforts to obtain insurance coverage and the means to pay for its defense in the underlying tort cases, or it can risk rendering its defense attorneys impotent

by publishing through public discovery their communications, strategies and thought processes.

Disclosure of confidential attorney-client communications also improperly interferes with the ability of Petitioner's attorneys to render legal advice to Petitioner in connection with these cases. Such an interference with an attorney's ability to freely communicate with his client constitutes an infringement of the due process right to retain counsel. Potashnick v. Port city Const. Co., 609 F.2d 1101, 1119 (5th Cir. 1980); Anderson v. Sheppard, 856 F.2d 741, 746-47 (6th Cir. 1988). Courts uniformly hold that even a relatively brief interference with attorney-client communication constitutes a violation of the client's constitutional rights. See,

e.g., Potashnick, supra, (right to counsel should be freely exercised without infringement); Doe v. District of Columbia, 697 F.2d 1115, 1119 (D.C. Cir. 1983); Mudd v. United States, 798 F.2d 1513 (D.C. Cir. 1986); Swope v. Braton, 541 F. Supp. 109 (W.D. Ark. 1982). The Court of Appeals in Martin v. Lauer, gave this explanation of the constitutional dimensions of the attorney-client privilege:

> Restrictions on speech between attorneys and their clients directly undermine the ability of attorneys to offer sound legal advice. As the common law has long recognized, the right to confer with counsel would be hollow if those consulting counsel could not speak freely about their legal problems. Through the attorney-client privilege, the common law "encourage[s] full and frank discussions between attorneys and their clients and thereby promote[s] broader public interests in the observance

> of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends on the lawyer being fully informed by the client." Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed.2d 584 (1981). Limitations on the attorney-client privilege have therefore been drawn narrowly, to remove the privilege only where the privileged relationship is abused. Absent such abuse, or a waiver of the privilege, our legal system jealously protects the confidential status of attorney-client communications. Although an adversary may ordinarily inquire as to what the client knows, he "'cannot [compel him] to answer the question "What did you say or write to your attorney?"'"

Upjohn Co. v. United States, 449 U.S. at 396, 101 S. Ct. at 686 (quoting Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962). Respondent and the state court

cannot constitutionally interfere with Petitioner's confidential communications with its counsel by requiring that Petitioner disclose these confidences during state court litigation.

Moreover, the state court order, also interferes with counsel's representation of Petitioner because it would force Petitioner to disclose its attorneys' mental impressions, private memoranda and defense strategies. In doing so, the order completely ignores existing precedent and the underlying policies of the work-product doctrine. In this case, Petitioner's attorneys' ability to assist and defend their client is also interwoven with the right to preserve the confidentiality of its attorneys' strategies and mental impressions which are reflected in the

deposition transcripts and exhibits which were permitted to be taken in reliance on the Keene v. INA protective order. Cf. Martin v. Lauer, 686 F.2d 24, 32 (D.D.C. 1982).

This Court has held that an attorney's thought processes fall outside the arena of discovery. Upjohn Co. v. United States, 449 U.S. 383, 394-95 (1981) (work-product of corporation's general counsel revealing counsel's mental processes such as notes and memoranda are protected by the work product immunity). See also Hickman v. Taylor, 329 U.S. 495, 510 (1947); In re Murphy, 560 F.2d 326 (8th Cir. 1977). In fact, opinion work-product of the nature which is the subject of this action is entitled to absolute immunity from discovery. Duplan Corp v. Moulinage et

Retorderie de Chavanoz, 509 F.2d 730 (4th Cir. 1974), cert denied, 420 U.S. 1975); In re Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973). Thus, the court said in Moulinage, "no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions or legal theories." 509 F.2d at 733-34.

The reason for the adherence to this exemption from discovery is best summarized by Justice Murphy's opinion in Hickman v. Taylor where he stated:

> Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence,

> briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways - aptly though roughly termed by the Circuit Court of Appeals in this case . . . as the "work product of the lawyer."
>
> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interest of the clients and the cause of justice would be poorly served.

329 U.S. at 511.

422 U.S. at 238-39 (emphasis added).

The disclosure of Petitioner's privileged materials results in an unwarranted intrusion into defense counsel's preparation of their case.

This intrusion will seriously encumber defense counsel's ability to assist and defend Petitioner so as to constitute a clear infringement of Petitioner's constitutional right to the assistance of counsel.

B. The Right of Access To The Courts

Defendants' attempts to obtain privileged documents also constitute an impermissible interference with Petitioner's constitutional right of access to the courts. The right of access to the courts is based in the due process clause. Ryland v. Shapiro, 708 F.2d 967, 972 (5th Cir. 1983). It is basic to our system of government and is one of the fundamental rights protected by the Constitution. Id. at 971. This Court has characterized this right in the following language:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . .

Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 148 (1907). Consequently, this right is deserving of "rigorous protection." Martin v. Lauer, 686 F.2d 24, 33 (D.C. Cir. 1982).

A mere formal right of access to the courts does not pass constitutional muster. Id. Courts require that the access be "adequate, effective, and meaningful." Bounds v. Smith, 430 U.S. 817, 822, 97 S. Ct. 1491, 1495, 52 L. Ed.2d 72 (1977). Interference with the right of access to the courts can give rise to a claim for relief under § 1983.

Ryland, supra at 972. Accord Boddie v. Connecticut, 401 U.S. 371 (1971); Marello v. James, 810 F.2d 344, 348 (2d Cir. 1987); Simmons v. Dickhart, 804 F.2d 182 (1st Cir. 1984); Carter v. Hutto, 781 F.2d 1028 (4th Cir. 1986). Conduct which impedes a client's communications with his attorney constitutes an interference with the fundamental right of access to the courts. Martin v. Lauer, 686 F.2d 24, 33 (D.C. Cir. 1982).

Respondent case seeks disclosure of confidential attorney-client communications and attorney work-product. These materials are, however, absolutely immune from discovery. In re Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973). Absolute immunity is necessary to preserve the "freedom of thought essential to carefully reasoned trial

preparation." Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593 (3d Cir. 1984). Thus, the disclosure of these materials to Respondent and litigants across the country will render Petitioner's access to the courts meaningless as it will seriously impede Petitioner's attorneys' ability to defend Petitioner. This Court should grant review in order to protect Petitioner's constitutionally protected rights from state court interference.

C. Interference With Federal Court Order

The state courts have chosen to ignore the existence of the federal court's protective order which directly conflicts with the subject state court order. The federal district court in Minnesota has refused to issue an order enjoining the threatened violation of its sister court's order and has dismissed

Petitioner's civil rights action. Court should issue an order protecting the federal court jurisdiction from invasion by the state court. See 28 U.S.C. § 2283; Sperry Rand Corp. v. Rothlein, 288 F.2d 245 (2d Cir. 1961) (federal court properly enjoined state court litigant from using materials divulged during federal proceeding).

II. PETITIONER WILL SUFFER IRREPARABLE HARM IF THE STATE COURT'S ORDER IS ENFORCED; CONSEQUENTLY, THE ORDER IS REVIEWABLE.

The Minnesota court's discovery order is sufficiently final to be accorded review during the pendency of the state court proceeding. The issues raised in the discovery order are collateral to the issues in the trial court proceeding. Consequently, interlocutory review is appropriate. Cf.

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Resolution of the matters raised by Petitioner in this appeal would not affect issues raised in the state court action and will not affect rights sought to be protected therein.

More importantly, if Petitioner is not granted review, it will irreparably lose any remedy for the deprivation of its constitutional rights. In the circumstances of this case, no post-deprivation remedy will suffice. Once the privileged material is disclosed, review will be ineffective. Courts have repeatedly recognized the inability of the judicial process to repair the damage done once privileged material is disclosed. Bogosian v. Gulf Oil Corp., 738 F.2d 587, 591 (3rd Cir. 1984)

(compliance with a disclosure order destroys the right to be protected); Pfizer Inc. v. Lord, 456 F.2d 545, 548 (8th Cir. 1972) (appeal after disclosure of privileged information is an inadequate remedy); Jenkins v. Weinshienk, 670 F.2d 915, 917 (10th Cir. 1982). Consequently, review at this time is appropriate. See Cox Broadcasting Corp. v. Cahn, 420 U.S. 469 (1975). See also, Pennsylvania v. Ritchie, ____ U.S. ____, 107 S. Ct. 989 (1987); Florida v. Meyers, 466 U.S. 380, 381 (1984), North Dakota State Board of Pharmacy v. Snyder's Drug Stores Inc., 414 U.S. 156 (1973). Here, as in the above-cited cases, there is simply no way for the state court to preserve the federal questions raised for review upon conclusion of the entire case.

Consequently, immediate review is appropriate.

CONCLUSION

Petitioner's constitutional rights will be irreparably damaged if the state court order requiring production of privileged materials is enforced. Moreover, enforcement of the order will require Petitioner to violate a federal court's protective order. Consequently, Petitioner respectfully requests that this Court grant a Writ of Certiorari to review the Minnesota state court's order.

Dated: August 22, 1989.

Respectfully submitted,

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON TENTH JUDICIAL DISTRICT

Independent School District
No. 622,

Plaintiff,

vs. ORDER

File No. C5-84-1701
Filed: Feb 02, 1989

Bor-Son Construction, Inc.;
Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret Hill Company and Keene Building Products Corporation);

Defendants,

and

Bor-Son Construction, Inc.,

Third-Party Plaintiff,

vs.

Corwin, Seppenan and Associates, Inc., and Insulation Sales Company,

Third-Party Defendants.

The above-entitled matter came on for hearing before the undersigned, the Honorable J. E. Cass, Judge of the above-named Court, on January 12, 1989, at the Washington County Government Center, Stillwater, Minnesota.

Attorneys Michael R. Strom and J. Anderson Berly, III, appeared for an on behalf of Plaintiff. Attorneys Mary R. Vasaly, David F. Herr, and Sharon A. Merkle appeared for and on behalf of Defendant Keene Corporation. Attorney John M. Anderson appeared for and on behalf of Defendant and Third-Party Plaintiff Bor-Son Construction, Inc. Attorney Keith Dunder appeared for and on behalf of Third-Party Defendant Insulation Sales Company. Attorney Courtney LeNeavy appeared for an on behalf of Third-Party Defendant Corwin, Seppenan and Associates, Inc.

The Court, after considering the arguments of counsel and memoranda submitted, and based upon all of the files, records, and proceedings herein, makes the following:

ORDER

1. That Defendant Keene Corporation's Motion for a protective order precluding Plaintiff from taking the following noted depositions:

David M. Rehbein
Keene Corporation (Rule 30(b)(6) [sic] Depositions)
Harvey Wilson

and from obtaining documents requested in connection therewith, is hereby **DENIED** as to David M. Rehbein and **GRANTED as to Keene Corporation and Harvey Wilson.**

2. That Plaintiff's Motion for an Order:

1. Compelling Defendant Keene Corporation to answer fully, completely, and specifically Plaintiff's Fourth Set of Requests

for Production dated August 1988 as follows: Nos. 1 through 6:

2. Compelling Defendant Keene Corporation to answer fully, completely, and non-evasively, Plaintiff's Third Set of Interrogatories dated August 1988 as follows: Nos. 1 through 7, and 13 through 25,

is hereby **GRANTED.**

3. **That Plaintiff's Motion for an Order:**

1. Compelling Defendant Keene Corporation to comply with this Court's November 21, 1988 Order requiring it to:

(a) answer fully, completely, and non-evasively, Plaintiff's Interrogatories dated April 16, 1984 as follows: Nos. 16, 17, 25 and 27;

(b) provide full, complete, and specific responses to Plaintiff's Request for Production of Documents dated April 16, 1984 by identifying each box of documents in which each response can be found to the following Request for Production, to wit: Nos. 4 and 5 (as to product Pyrospray), 6 through 17, 20 through 23, and 25 through 28;

(c) answer fully, completely, and

specifically Plaintiff's Third Request for Production dated April 15, 1987;

(d) produce all documents responsive to Plaintiff's Request for Production dated October 29, 1986;

(e) provide to Plaintiff each of the items listed above no later than January 27, 1989;

is hereby **GRANTED**.

4. That Plaintiff's Motion for an Order granting costs and sanctions against Defendant Keene Corporation in the amount of $1,000.00 for repeatedly refusing to respond as previously ordered by this Court to Plaintiff's Interrogatories dated April 16, 1984, as well as Plaintiff's three sets of Requests for Production dated April 16, 1984, April 15, 1987 and October 29, 1986, and for deliberately disregarding this Court's November 21, 1988 Order, is hereby **DENIED**.

5. That the Washington County Court

Administrator shall serve a true and correct copy of this Order by u.S. mail upon the attorneys for the above-named parties which shall constitute due and proper service of this Order for all purposes.

Dated:_____ _____

J. E. Cass
Judge of District Court

STATE OF MINNESOTA

IN COURT OF APPEALS

Independent School District
No. 622,

Respondent,

vs.

ORDER

#C3-89-389
Filed: March 22, 1989

Bor-Son Construction, Inc.,
Keene Corp. (successor-in-
interest to Baldwin-Hill Co.,
Baldwin-Ehret Hill Co. and
Keene Building Products
Corp.),

Petitioner,

and

Bor-Son Construction, Inc.,
third-party plaintiff,

Respondent,

vs.

Corwin, Seppenan and
Associates, Inc., third-party
defendant,

Respondent,

Insulation Sales Co., third-party defendant,

Respondent.

Considered and decided by Wozniak, Chief J., Foley, J., and Nierengarten, J.

BASED UPON THE FILE, RECORD AND PROCEEDINGS HEREIN, AND BECAUSE:

1. By order on November 21, 1988, the trial court compelled petitioner to provide additional discovery responses to interrogatories and requests for production posed in 1984, 1986, and 1987; and

2. By further order on February 1, 1989, the trial court denied petitioner's motion to quash the deposition of paralegal, directed petitioner to answer interrogatories posed in August 1988, and compelled compliance with the November 1988 discovery order; and

3. Petitioner seeks discretionary review, or a writ of prohibition, for

relief from the February 1, 1989 order; and

4. Prohibition will ie where the trial court has ordered disclosure of information which is clearly not discoverable, Mampel v. Eastern Heights State Bank of St. Paul, 254 N.W.2d 375, 377 (Minn. 1977), or where the trial court has so abused its discretion as to result in imminent injury for which no ordinary remedy, such as an appeal from the final judgment, is adequate, Hancock-Nelson Mercantile Co., Inc. v. Weisman, 340 N.W.2d 866 (Minn. Ct. App. 1983); and

5. Discretionary review is rarely appropriate in discovery disputes, absent a constitutional question or a pressing issue of broad application, Clark v. Monnens, ____ N.W.2d (Minn. Ct. App. March 21, 1989); and

6. Petitioner argues that much of the discovery sought by respondent school

district is directed to documents allegedly privileged or under seal by order of the federal courts; and

7. The district is not seeking the release of an discovery materials held by the federal courts, and is seeking only original documents, belonging to petitioner, and collected in the document center; and

8. It does not appear that any federal protective order prohibits petitioner from disclosing its <u>own</u> documents, merely because they were produced in other actions; and

9. Keene failed to establish the trial court has compelled disclosure of information which is clearly not discoverable, so as to justify the issuance of prohibition on petitioner's claim of privilege; and

10. Petitioner further objects to the trial court's requirement that it identify the specific boxes in the document center where answers to discovery requests may be found; and

11. Minn. R. Civ. P. 33.03 requires a party to specify "in sufficient detail as to permit the interrogating party to locate and to identify" records from which discovery answers may be ascertained; and

12. Keene has already produced many of the requested documents in connection with other suits, and has presumably reviewed many of the documents in connection with discovery on this matter, and it failed to establish the trial court so abused its discretion in requiring greater specificity as to justify the issuance of prohibition; and

13. Petitioner claims the trial court's allowance of the deposition of paralegal

Rehbein will permit inquiry into "areas protected by the attorney-client privilege and where work product could be disclosed"; and

14. The school district's motion papers in the trial court indicated the scope of the deposition would be limited to inquiry about the collection and destruction of documents; and

15. The trial court's order does not preclude petitioner from seeking a protective order in the course of the deposition, if a claim of privilege applies to a specific question posed by the district's counsel; and

16. Petitioner failed to establish the trial court has order disclosure of information which is clearly not discoverable, or so abused its discretion in permitting a limited deposition, and prohibition will not lie;

IT IS HEREBY ORDERED the petitions for prohibition and discretionary review are denied in their entirety.

Dated: March 21, 1989

BY THE COURT

_____

Chief Judge

C-1

STATE OF MINNESOTA

IN COURT OF APPEALS

C3-89-389
Filed May 24, 1989

Independent School District # 622,

Respondent,

vs.

Bor-Son Construction, Inc.,

Respondent,

Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret Hill Company and Keene Building Products Corporation),

Petitioner,

and

Bor-Son Construction, Inc., third-party plaintiff,

Respondent,

vs.

Corwin, Seppenan and Associates, Inc., third-party defendant,

Respondent,

Insulation Sales Co., third-party defendant,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Keene Corporation for further review be, and the same is, denied.

Dated: 5/24/89

BY THE COURT:

_____

Chief Justice

D-1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Keene Corporation, a corporation,
Plaintiff,

v.

Judge J. E. Cass, et al.,

Defendants.

Civil File No. 3-89-378
Filed: 6/28/89

ORDER

David F. Herr, Esq., Maslon, Edelman, Borman & Brand, 1800 Midwest Plaza, Minneapolis, MN 55402, appeared on behalf of the plaintiff.

Peter M. Ackerberg, Esq., Special Assistant Attorney General, Suite 200, 525 Park Street, St. Paul, MN 55103, appeared on behalf of Judge Cass.

Michael Sieben, Esq. Hertogs, Fluegel, Sieben, Polk, Jones, and LaVerdiere, P.A., 999 Westview Drive, Hastings, MN 55033, appeared on behalf of the remaining defendants.

Before the court is the motion of Keene Corporation for a temporary restraining order which the court will consider as a motion for a preliminary injunction,

pursuant to Fed. R. Civ. P. 65(a), and the defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

For the reasons set forth on the record following oral argument, the court denies the motion of Keene Corporation for preliminary injunction and grants the defendants' motion to dismiss. Accordingly, **IT IS ORDERED** that:

1. The motion of Keene Corporation for a preliminary injunction, pursuant to Fed. R. Civ. P. 65(a) is **DENIED**, and

2. The defendants' motion for dismissal, pursuant to Fed. R. Civ. P. 12(b)(1) is **GRANTED.**

LET JUDGMENT BE ENTERED ACCORDINGLY

Dated: June 23, 1989.

Paul A. Magnuson
United States
District Judge

E-1

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

Keene Corporation,

Plaintiff,

v.

3-89-378 Civil
Dated: June 23, 1989

Judge J. E. Cass, not individually but as a Judge of the Minnesota District Court, Tenth Judicial District, et al.,

Defendants.

THE COURT: Okay. Before the Court is the motion of Keene Corporation for a temporary restraining order to which the Court, because of notice and briefing by both sides the Court considers as a preliminary injunction pursuant to Fed. R. Civ. P. 65(a). Keene contends that a discovery order issued by Judge Cass in Independent School District Number 622 v. Bor-Son Construction, Inc., no. C5-84-1701,

violates Keene's federally-protected constitutional rights. Under the guise of a civil rights violation, Keene seeks to enjoin the enforcement of that order.

The Court has considered the record before it, including the submissions of counsel. The Court denies the motion of Keene Corporation for preliminary injunction and grants the dfendant's motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

The Supreme Court held in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, that a Federal District Court is without authority to review final determinations of State Court in juridical proceedings. Id. at 476. The appropriate federal forum for review of such decisions is the United States Supreme Court. Keene pursued his appeal through the State

Appellate system. Having failed to obtain the desired relief, his only options were to seek review from the Supreme Court or to comply with the order.

In Harris v. Missouri Court of Appeals, 787 F.2d 427 (eighth Circuit 1986), cert. denied 107 S. Ct. 173, the plaintiffs brought suit under Section 1983 seeking monetary damages and injunctive relief against the Missouri Court of Appeals. Citing Feldman, the Eighth Circuit noted that a, "federal District Court has no authority to review a State Court's final judgment." Id. at 429. The Court also held that, "(i)ndividual judges are immune to civil suit when acting within their judicial capacity, even in Section 1983 civil rights actions." Id.

Based on Harris, this Court lacks subject matter jurisdiction not only because this Court is not the proper forum for review of

the underlying order, but also because the primary defendant, Judge Cass, is immuned from suit.

Counsel, the Court will enter a short form order in accordance with the brief ruling that I have made with respect to this today. I acknowledge that under the time constraints placed on all of us that this is a rather short form order on the matter.

I would reserve the right to enter a more formal order if I deemed that appropriate, but a more formal order would not be inconsistent with the short form order that has been presented today.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON
TENTH JUDICIAL DISTRICT

Independent School District No. 622,

File No. C5841701

Case Type: Product Liability

Plaintiff,

vs.

Bor-Son Construction, Inc.; and Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company and Keene Building Products Corporation),

Defendants,

and

Bor-Son Construction, Inc.,

Third-Party Plaintiff,

vs.

Corwin, Seppenan and Associates, Inc. and Insulation Sales Company,

Third-Party Defendants.

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL AND FOR COSTS AND SANCTIONS

On January 4, 1989, Plaintiff filed a further motion to compel. Following this Court's Order of November 21, 1988, Keene supplemented its answers to interrogatories and is producing additional documents.

Plaintiff now sets forth further complaints regarding three of Keene's seventeen supplemental answers to Plaintiff's April 16, 1984 interrogatories.[1] Keene's supplemental answers were served pursuant to the November 21, 1988 Order.

Plaintiff's present motion also addresses supplemental responses which are yet to be served to Plaintiff's various requests for production of documents. Despite Keene's good faith efforts in compliance with the November 21, 1988 Order (See the Affidavit of Sharon A. Merkle and exhibits), Plaintiff accuses Keene of disregarding the Court's Order.

The present motion also seeks to compel further responses to Plaintiff's Fourth Set of Requests for Production of Documents dated August 1988 and Plaintiff's Third Set of Interrogatories dated August 1988. Copies of these requests are attached to the Affidavit of Sharon A. Merkle as Exhibits A and B, respectively.

Plaintiff's August 1988 requests for production of documents seek copies of documents which have been placed under seal by the United States District Court for the District of Columbia in an insurance coverage action brought by Keene against its insurers. A motion seeking discovery of these materials by counsel representing various plaintiffs in personal injury litigation in the State of Texas was denied in August of 1988 by the United States District Court.[2] Keene responded to Plaintiff's requests for production of these

documents by refusing to produce documents under seal in the coverage litigation. In a letter to Plaintiff's national counsel dated November 8, 1988, Keene's national counsel explained Keene's position. See Exhibit C to the Affidavit of Sharon A. Merkle.

Plaintiff's requests for production of documents served on Keene in August 1988 also seek the production of documents produced to the United States Government in an action in the United States Court of Claims. These documents were produced under the terms of a protective order issued by that Court. Keene responded to Plaintiff's request for these documents on September 9, 1988, declining to produce the documents on several grounds.

I. FACTUAL BACKGROUND

additional index in order to respond to Plaintiff's discovery requests in this case.

Based upon the foregoing, Keene respectfully requests that plaintiff's present motion to compel be denied in all respects and the Court issue an order holding that Keene is not required to undertake a separate review of the documents in its document center to select specific documents or to create an index of documents responsive to Plaintiff's discovery requests in this case.

By its fourth set of requests for production of documents, Plaintiff seeks production of documents which are under seal by order of the United States District Court for the District of Columbia and documents produced in a

Court of Claims action brought by Keene against the United States Government.

In 1978, Keene brought a coverage action against its insurers seeking a determination as to coverage with respect to the underlying asbestos personal injury claims. The issues in the litigation focused on the nature and quality of Keene's defense in the asbestos personal injury litigation. Parties to the coverage action included insurers which are not involved in the present case. Various records and testimony now sought by plaintiff herein were placed under seal by the federal court. Keene's argument as to why plaintiff's discovery must be disallowed is fully set forth on pages 4 through 14 of Keene's Memorandum in Support of its Motion for Protective Order. See also the Affidavit of Mary R.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON
TENTH JUDICIAL DISTRICT

Independent School District No. 622 — File No. C5841701 Property Damage

Plaintiff,

vs.

Bor-Son Construction, Inc.; Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company and Keene Building Products Corporation),

Defendants,

and

Bor-Son Construction, Inc.,

Third-Party Plaintiff,

vs.

Corwin, Steppenan and Associates, Inc. and Insulation Sales Company,

Third-Party Defendants.

KEENE CORPORATION'S MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

ARGUMENT

I. THIS COURT MUST SUPPRESS DISCOVERY ON THE INSURANCE COVERAGE DISPUTE.

Plaintiff's discovery requests are directed, in large part, to discover information from a discovery dispute between Keene and its liability insurers relating to coverage for certain claims. That action is pending in the United States District Court for the District of Columbia, and the various records and testimony plaintiff now seeks were place under seal by that court. The protective order sealing these records, dated March 30, 1984, is attached to the Affidavit of Mary M. Vasaly as Exhibit A.

This Court should grant Keene a protective order against the requested discovery for the following reasons:

(a) The information sought is subject to the Federal Court's seal, and

claims against Keene.

(e) The Minnesota Rules of Civil Procedure do not contemplate discovery of the information sought by plaintiff.

Keene filed its insurance coverage action in June 1978. Insofar as Keene is concerned, the action was substantially resolved by the May 13, 1983, decision of the federal court. Keene Corp. v. Insurance Co. of N. Am., No. 78-1011-JLG, slip op. (D.D.C. May 13, 1983). That decision is Exhibit B to the Affidavit of Mary R. Vasaly. Keene's claims for punitive damages based on bad faith were resolved in 1984, by settlement, on the eve of trial.

Solely in connection with Keene's claims for punitive damages for bad faith, Mr. David Rehbein was deposed by the insurance carriers in August and

September 1984. At the time of his deposition, Mr. Rehbein was (and still is) employed by Anderson Russell Kill & Olick (hereafter "ARKO"). See the attached Affidavit of Howard A. Mileaf (hereafter "Mileaf Aff." at ¶ 6.) ARKO served (and still serves) as Keene's national defense counsel in asbestos-related litigation, and Mr. Rehbein's duties at ARKO have consisted largely of acting as the administrator for the defense of the asbestos-related litigation involving Keene. Mileaf Aff. at ¶ 6. At his deposition, Mr. Rehbein discusses details of the management and adequacy of Keene's defense in asbestos-related litigation. Mileaf Aff. at ¶ 6. Thus, Mr. Rehbein's deposition testimony concerns privileged matters which plaintiff has no right to discover under

As shown above, Mr. Rehbein is an ARKO employee intimately involved in assisting Keene's attorneys in Keene's defense of asbestos-related litigation. See Mileaf Aff. at ¶ 6. As also shown, Keene would not have allowed Mr. Rehbein to testify concerning the conduct of Keene's defense and to produce the subject documents, absent a protective order covering his deposition and the exhibits to it. Mileaf Aff. at ¶ 8. Keene's justifiable reliance on the protective order in allowing Mr. Rehbein to testify as he did provides even more support for denying plaintiff's motion. See, e.g., Tavoulareas v. Washington Post Co., 111 F.R.D. 653, 658 (D.D.C. 1986) ("Tavoulareas").

In Tavoulareas, the defendant sought to lift a protective order pursuant to which

it had received voluminous discovery, without objection. In denying the motion with respect to documents not made a part of the public record at trial, the Tavoulareas court emphasized the fact that much of the discovery sought to be unsealed had been provided in reliance on the protective order:

> The Court must consider the fact that Mobil's cooperation in this process was obtained in reliance upon the blanket protective order, which included a requirement that the information be used only in preparation for litigation.

111 F.R.D. at 658-59. The Court found such reliance to be a "significant factor in determining whether to lift a seal on discovery materials." Id. at 659 (citations omitted). See also Martindell, 594 F.2d at 295, where the court stated:

> Unless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences.[3]

This point also is demonstrated by H.L. Hayden Co. of N.Y. v. Siemen Med'l Sys., Inc., 106 F.R.D. 551 (S.D.N.Y. 1985), aff'd in part and dismissed in part, 797 F.2d 85 (2d Cir. 1985) ("Hayden"). In Hayden, the court denied a motion to modify a protective order, on multiple

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[3] Martindell distinguished Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326 (9th Cir. 1977), which vacated a lower court judgment rendered on a motion made by nonparties who had not expressly been granted leave to intervene, based on the fact that the party who might have opposed the nonparties' motion in Spangler had not had the opportunity to oppose the motion.

grounds, one of which was the parties' reliance on the order:

> The defendants' reliance on the protective order is also significant. The defendants proceeded with discovery under the expectation that the materials they disclosed would be used only for purposes of this lawsuit. The protective order facilitated a discovery process which the plaintiffs in their papers have described as "extensive and painstaking." The order was utilized to secure "the just, speedy, and inexpensive determination," Fed. R. Civ. P. 1, of an expensive, protracted and often bitter dispute.

Id. at 556. Thus, Keene's reliance on the protective order in allowing Mr. Rehbein to testify warrants denial of plaintiff's motion.

C. The Deposition Testimony and Documents Sought Have No Bearing on Plaintiff's Claims

STATE OF MINNESOTA

IN COURT OF APPEALS

Independent School
District No. 622

Plaintiff (Respondent),

vs.

PETITION FOR WRIT OF PROHIBITION

Bor-Son Construction, Inc.;
Keene Corporation
TRIAL COURT CASE
(successor-in-interest to
C5-84-1701
Baldwin-Hill Company, Baldwin-
Ehret-Hill Company and Keene
APPELLATE COURT CASE
Building Products
Corporation),

NO.:

NO.: _____

Defendants (Keene Petitioner),

and

Bor-Son Construction, Inc.,

Third-Party Plaintiff,

vs.

Corwin, Seppenan and
Associates, Inc. and
Insulation Sales Company,

Third-Party Defendants.

TO: The Court of Appeals of the State of Minnesota:

Petitioner, Keene Corporation ("Keene"), requests a Writ of Prohibition restraining the Washington County District Court from enforcing its order of February 1, 1989. Petitioner further requests that consideration of this petition be expedited and that the trial court's order be stayed pending its consideration so as to preserve the status quo.

REASON FOR EXTRAORDINARY RELIEF

Keene seeks review of the trial court's pretrial discovery order because its enforcement will result in immediate and irreversible harm to Keene. The issues in the discovery dispute before that court concerned disclosure of privileged information as well as the expenditure of extraordinary costs to meet plaintiff's demand that Keene not be allowed to respond to discovery by producing business records as kept in the ordinary course of business pursuant to Minn. R. Civ. P. 33.03. If the trial court's order is not reviewed now, Keene's rights with respect to these issues will be irretrievably lost.

Keene is entitled to the relief it seeks because the trial court's order constitutes a clear abuse of judicial discretion.

Even if the court had allowed time to do so, it would be impossible for Keene to review each of the four million documents in the document center in order to respond to plaintiff's discovery in this case. Certainly, the burden upon plaintiff to review the documents is no greater than the burden the trial court's order places upon Keene to do so. Production of business records which have been preserved as they were found as generated in the ordinary course of business is a sufficient response to plaintiff's discovery under the Minnesota Rules of Civil Procedure.

The trial court has inappropriately ordered the identification and production of documents which are privileged and have been sealed by another court. The court has also ordered that Mr. Rehbein testify at a deposition and produce documents in connection therewith concerning matters relating to Keene's defense which are absolutely privileged. If the privileged documents were to be disclosed and Mr. Rehbein were to testify, sensitive, confidential and privileged information would become public knowledge. Keene would have irretrievably its lost constitutional right to

counsel as well as its rights with respect to this privileged information. Consequently, Keene requests that the Court prohibit the trial court from enforcing its order requiring the disclosure of this information.

STATE OF MINNESOTA
IN SUPREME COURT

Independent School
District No. 622,

Plaintiff (Respondent),

PETITION OF DEFENDANT, KEENE CORPORATION, FOR REVIEW OF DECISION OF COURT OF APPEALS

vs.

Bor-Son Construction,
Inc., et al,

APPELLATE COURT CASE

NO. C3-89-389

Defendants,

Keene Corporation,

DATE OF FILING OF COURT OF APPEALS DECISION:
March 22, 1989

Defendant (Petitioner).

TO: The Supreme Court of the State of Minnesota:

Petitioner, Keene Corporation requests Supreme Court review of the decision of the Minnesota Court of Appeals upon the following grounds:

1. Keene's appeal and application for a writ presents several important questions upon which the Supreme Court should rule;
2. Keene's appeal raises questions concerning the constitutionality of the trial court's order;
3. The trial court has so far departed from the accepted and usual course of justice as to call for an exercise of the Supreme Court's supervisory powers; and

4. A decision by the Supreme Court will help to develop the law in several areas of discovery practice.

The Court of Appeals refused to reverse an unprecedented lower court order which violates Keene's privileges and prejudices its ability to defend itself in this and other actions. The order requires Keene to produce copies of documents which have been placed under seal by the United States District Court for the District of Columbia. It also requires Keene to produce an employee of its national litigation counsel for deposition. In addition, the order requires Keene to review over 4,000,000 documents in order to respond to discovery. The Court of Appeals has refused to protect Keene from imposition of these improper trial court orders. Given the grave impact of these orders upon Keene and their direct conflict with the order of the Federal Court and with normal discovery procedure, the Supreme Court should exercise its discretion to review the Court of Appeals' decision.

A. Documents Sealed by Court Order. Plaintiff's discovery requests and the trial court's order require Keene to produce copies of documents sealed by the Federal Court. Keene cannot produce these documents without violating that court's order. The Court of Appeals, however, failed to address this issue. The Court reasoned that Keene could

produce copies of documents generated by Keene rather than the sealed copies. (Opinion, ¶ 8.) In fact, the subject documents are not business records of KBPC or its subsidiaries, but are attorney work-product and other materials generated by Keene and others in connection with its defense of asbestos litigation and depositions taken in the coverage litigation concerning Keene's defense in the asbestos litigation. Thus, the trial court's order requires Keene to produce the very documents placed under seal by the Federal Court. Keene is entitled to Supreme Court guidance in its effort to comply with these conflicting court orders.

B. **Privileged Documents.** Keene also objects to the production of these documents on grounds of privilege. The trial court's order requires Keene to identify and produce documents which contain both confidential attorney-client communications and counsel's trial preparation materials. These documents concern Keene's handling of its defense of asbestos litigation such as this case. If this work-product information is disclosed in this action, Keene's ability to defend the many asbestos-related actions in which it is a defendant would be seriously prejudiced. It was precisely because of the catastrophic effect disclosure would have both upon Keene's ability to defend itself and the rights of other

parties that these materials were sealed. The trial court's order requiring the production of these documents in a case where their disclosure could impact asbestos litigation nationally represents an unprecedented intrusion into Keene's constitutional rights to due process and to retain counsel for its defense and a significant departure from the accepted and usual course of justice.

The Court of Appeals opinion focused only upon whether Keene may produce documents which have been sealed. The Court simply ignored the underlying basis for Keene's objection to the production of the documents - that they are absolutely privileged. Under Clark v. Monnens, 436 N.W.2d 830 (Minn. Ct. App. 1989), cited by the Court of Appeals, such a claim of privilege triggers review by the appellate court. The refusal of the Court of Appeals to address this issue mandates Supreme Court review.

C. The Document Center. In asking the court to prohibit enforcement of the trial court's order requiring Keene to review the millions of documents in its Document Center, Keene raises questions never before addressed in Minnesota: (1) whether a defendant may use the document center approach to respond to numerous competing discovery requests in cases where millions of documents may be potentially relevant in connection with thousands of cases

throughout the country; (2) whether a party may produce a set of business records as they are stored when the producing party is unfamiliar with the documents because the documents are those of another corporation.

Keene will be irreparably harmed if it is required to review all of the documents in the Document Center. The cost to review these documents actually exceeds the amount in dispute in this case and is simply unjustified. Once Keene has incurred the expense of reviewing the documents in the Document Center (assuming that this task is even possible), Keene will have no remedy for recoupment of these costs. Thus, the court's order unconstitutionally interferes with Keene's ability to defend itself in this action.

CONCLUSION

This case is one which is appropriate for Supreme Court review. Once the trial court's order is enforced, Keene will have irretrievably lost its constitutional right to retain counsel, its due process right to defend this and other litigation, and its rights with respect to privileged information contained in the documents at issue.

WHEREFORE the petitioner requests an order of the Court granting the Petition for Review of the Decision of the Court of Appeals.

No. 89-436

Supreme Court, U.S.
FILED
SEP 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

KEENE CORPORATION,

Petitioner,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 622,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

HERTOGS, FLUEGEL, SIEBEN
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Attorneys for Respondent

1989-Executeam Companies, Inc., 93 W. Little Canada Rd., St.Paul MN 55117 • (612) 483-8793 • 800-747-8793

QUESTIONS PRESENTED

1. Should this Court grant interlocutory review on a State Court's pretrial discovery order?

2. Should this Court consider federal constitutional claims which were first raised on appeal and which the State Appellate Courts declined to decide because of their rule against hearing questions not raised in the trial court?

3. Do documents of a party become undiscoverable simply because they have also been produced in a different case in a different court and have been placed under a consent protective order in that other court?

LIST OF PARTIES AND RULE 28.1 LIST

Respondent incorporates the List of Parties and Rule 28.1 List of Petitioner.

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APPENDIX

A. *Independent School District No. 622 v. Bor-Son Construction, Inc., et al. No C3-89-389 (Minn. App. 1989)* (Response of Independent School District No. 622 to Keene Petition to Minnesota Court of Appeals A-1

B. *Independent School District No. 622 v. Bor-Son Construction, Inc., et al. No. 5841701 (1989)* (Memorandum of Independent School District No. 622 to trial court) B-1

C. *Independent School District No. 622 v. Bor-Son Construction, Inc., et al. No. C5841701 (1989)* (Keene Response to Discovery Request) C-1

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

Keene Corporation,

Petitioner,

v.

Independent School District No. 622,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

STATEMENT OF FACTS

This petition involves one portion of one pretrial discovery order entered by a State Court in Minnesota, in a lawsuit which was filed in 1984 and which has yet to go to trial. Most of the five years of litigation have been spent on discovery and discovery disputes. Numerous motions to compel by respondent have been filed and granted.

In response to several of respondent's requests for production of documents, petitioner refused to provide the specific documents but instead directed respondent to a collection of over four million documents contained in petitioner's record center.[1]

In opposition to the argument that the protective order

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[1] The State Court order which Keene seeks this court to overrule, in addition to requiring the disclosure of material which Keene alleged, but did not establish, was privileged, also overruled Keene's objections to specifying which of the four million documents were responsive to plaintiff's discovery requests. The District Court specifically found that Keene failed to meet the requirements of M. R. Civ. P. 33.03.

issued in the insurance case blocked discovery in this case, respondent pointed out that the language of the protective order itself disavowed any such meaning:

> 6. Nothing in this Order shall be construed in any way to control the use, dissemination, publication or disposition (1) by a producer or designator of documents or information existing in the files of that party prior to the date of the order; or (2) by a producer or designator of documents or information received at any time by that producer or designator outside the course of this litigation. The privileged or confidential status, if any, of such documents or information shall be determined without respect to this order.

The trial court overruled petitioner's objections and ordered the documents produced. Order of February 1, 1989. *See* Keene Appendix A-1. No constitutional claims had been raised in the trial court.

Petitioner's response to this order was to seek discretionary review and a Writ of Prohibition from the Minnesota State Court of Appeals. *See* Appendix A-1, Response to Keene's Petitions. In that appeal, petitioner first raised some of the federal constitutional issues it now wishes to present to this Court. The Court of Appeals declined to review the action by way of appeal, and rejected the petition for a Writ of Prohibition, finding that "Keene failed to establish the Trial Court has compelled disclosure of information which is clearly not discoverable, so as to justify the issuance of prohibition on petitioner's claims of privilege". The Court did not address the constitutional claims. *See* Keene Appendix B-4, Paragraph 9.

Petitioner finally sought review from the Minnesota Supreme Court from the order of the Court of Appeals, which was similarly denied. *See* Keene Appendix C-1.[2]

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[2] Petitioner has also attempted to circumvent the rulings of the Minnesota Courts by filing a 28 U.S.C. § 1983 action in the United States District Court for the District of Minnesota against the School District, its board members and counsel, and the trial court judge. That action sought to enjoin the named defendants from enforcing the February 1, 1989 Order. The United States District Court, Judge Paul A. Magnuson, recognized that Keene's purported civil rights action was merely an attempt to obtain review of the Minnesota Courts' rejection of Keene's privilege claims, and held that it was without jurisdiction to entertain such an action. *See* Keene Appendix

This petition followed.

REASONS FOR DISALLOWANCE OF WRIT

The underlying subject matter of Keene's petition, despite its claims of important federal questions, is merely a pretrial discovery dispute in the Minnesota State Courts. As this Court has held on numerous occasions in the past, such disputes are not subject to interlocutory review by this Court.

Additionally, petitioner failed to raise its purported due process arguments at the trial court level. Consequently, petitioner has failed to preserve these issues for appeal to either this Court or the Minnesota appellate courts. The due process issues are thus inappropriate for review on this basis as well.

Finally, Independent School District No. 622 submits that the issues before this Court, were it to grant Keene's petition, would consist of nothing more than review of the Minnesota courts' application of discovery and privilege rules identical to those in a federal action. Such issues are by no means "special", and are at best "important" only to the parties themselves. Keene has failed to meet its burden under this Court's Rule 17.1, and its petition should be denied.

ARGUMENT

I. THIS COURT SHOULD NOT GRANT INTERLOCUTORY REVIEW OF THIS PRETRIAL DISCOVERY ORDER.

This Court has repeatedly held that it will not grant interlocutory review of pretrial discovery orders. *Cobbledick v. United States*, 309 U.S. 323 (1940), *United States v. Ryan*, 402 U.S. 423 (1971), *Pennsylvania v. Richie*, 480 U.S. 39 (1987). Despite petitioner's attempt to create a constitutional issue out of what is no more than State Court discovery dispute, it cannot avoid the fact that this case is, at this time, not subject to review. This Court should consequently deny petitioner's petition.

D-1, E-1. Petitioner is currently pursuing an appeal of Judge Magnuson's Order in the Eighth Circuit.

II. PETITIONER FAILED TO PRESERVE ITS DUE PROCESS CHALLENGES FOR REVIEW, NECESSITATING DENIAL OF REVIEW AS TO THOSE ISSUES.

As a condition precedent to review of a federal question by the Supreme Court on certiorari from the highest state court, the state court must have "passed upon" the issue itself. *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983). *See also Hill v. California*, 401 U.W. 797, 805 (1971), *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 1940). As admitted by Keene in its Petition at page 9, it failed to raise its due process claims until its petitions to the Minnesota State Court of Appeals. Under Minnesota law, issues not presented to the trial court may not be raised for the first time on appeal. *In re: Welfare of K.T.*, 327 N.W.2d 13, 16-17 (Minn. 1982). Petitioner's arguments to the Minnesota appellate courts concerning the right to assistance of counsel, the right to access to the courts, and the alleged irreparable harm threatened were therefore not subject to review. Consequently, the Minnesota appellate courts ignored these issues, and they are not properly before this Court.

III. REVIEW OF THE MINNESOTA COURTS' REJECTION OF PETITIONER'S UNSUBSTANTIATED PRIVILEGE CLAIMS IS NOT NECESSITATED BY SPECIAL OR IMPORTANT REASONS, BUT WOULD MERELY INVOLVE THE REHEARING OF A STATE COURT DISCOVERY MOTION.

Although Keene's petition attempts to dress this garden variety discovery dispute in constitutional clothes, it cannot avoid the underlying fact that each of its arguments is premised on the unsupported assertion that the documents ordered produced are privileged. Consequently, the federal issues petitioner hopes to raise before this Court are non-existent unless this Court were to determine as a preliminary matter that the Minnesota courts' rejection of petitioner's privilege claims was error.

This threshold issue does not involve any interpretation of federal law or the Constitution, and involves no more than the proper application of the law of privilege in Minnesota state court discovery disputes. Resolution of this issue will only determine whether certain specific documents are indeed privileged

as claimed, or whether petitioner met its burden of proving that privilege. While important to the litigants in this case, this state law issue is of no general importance and is not within the scope of issues reviewable under Rule 17.1.

Petitioner's attempt to convince this Court that the Minnesota trial court never rejected its privilege claims (as it granted respondent's motion without opinion) is strained at best. In order to grant the respondent's motion, the trial court necessarily contemplated and overruled these objections as being without merit. Indeed, the Minnesota Court of Appeals denied petitioner's writ of prohibition on the specific grounds that petitioner failed to establish its privilege claims. *See* Keene Appendix B-4, paragraph 9.

Petitioner's additional argument that the respondent made no challenge to its privilege claims misstates the entire substance of the underlying motion hearing. On the contrary, the respondent's written submissions directly refuted Keene's unsubstantiated privilege claims. *See* Appendix B-4. Further, petitioner ignores the fact that in such a challenge, it is incumbent on the party asserting the privilege to substantiate it, not on the discovering party to disprove it. *Sprader v. Meuller*, 265 Minn. 111, 121 N.W.2d 176 (1963); *See also* D. Herr and R. Haydock *2 Minnesota Practice Civil Rules Annotated* § 26.9 (1989).

Further, petitioner's attempt to sidestep these facts by representing to this Court that "it had already made all the record center documents available" (Keene Petition at 7) misstates the substance of the dispute. The insurance litigation documents sought by the respondent are and have always been a discrete subset of documents in Keene's record center. Despite the fact that petitioner had offered to make the four million documents available for inspection generally, it strenuously objected to producing separately those record center documents which it had also produced in its insurance litigation. The Minnesota courts properly saw this objection as an attempt to limit the respondent's discovery to the prohibitively expensive task of reviewing each of Keene's four million documents, and properly rejected this attempt.

The Minnesota courts also could not help but take note of the fact that despite its arguments that the documents sought were "undeniably privileged", petitioner strenuously objected to producing a privilege index for the requested documents. *See* Appendix C-2-3, No. 6. Petitioner's objection necessitated the trial court's February 1, 1989 Order compelling production of

such an index, but petitioner has to date failed to comply. Given petitioner's refusal to substantiate its claim by means of a privilege index, it is difficult to imagine any court sustaining its objections.

Petitioner's repeated objection that the requested documents were placed under seal by the U.S. District Court for the District of Columbia ignores the fact that in entering the order, the Court merely accepted a stipulated order of the parties. Petitioner also ignores the fact that the protective order specifically permits petitioner to disseminate any document which it produced in its insurance litigation or any documents existing in its files prior to the date of the protective order. *See* page 2, *supra*. It further states that it makes no determination that any of the documents are privileged. *id.* Notwithstanding the clear language of the protective order, petitioner has nonetheless refused to separately produce any document produced in that litigation, and has similarly refused to list such documents such that the respondent or the Court could determine which, if any, of the requested documents is indeed precluded from disclosure under the protective order.

In summary, Keene's petition is premised on the validity of its claims that the documents ordered produced are absolutely privileged or under a Federal Court seal prohibiting their disclosure. The Minnesota courts have repeatedly rejected those claims, and there exists no reason to suppose that further review will hold otherwise.

Finally, petitioner's claims that this rejection of unsubstantiated privilege claims amounts to a denial of right to counsel, access to courts, and due process is baseless. Despite petitioner's citation of this Court's opinions involving the denial of counsel in criminal capital cases, the right to a hearing in termination of welfare benefit cases, and the disqualification of a judge due to a relationship to one of the parties, to name but a few, the constitutional rights protected in those cases are simply not present here. The authority is far field from the issue presented here, and does not make petitioner's state law claims of constitutional dimension.

This Court has previously held that it will not grant certiorari to review a decision that rests solely on an analysis of the facts or to determine whether the evidence supports a judgment of another court. *National Labor Relations Board v. Pittsburgh Steamship Company*, 340 U.S. 498, 503 (1951). Issuance of a writ in this case would result in nothing more than such a review. Keene's petition presents no issues of special importance

to necessitate review, and the respondent thus respectfully requests this Court deny certiorari.

Dated: September 22, 1989.

Respectfully submitted,

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STATE OF MINNESOTA

IN COURT OF APPEALS

Independent School District
No. 622,

Plaintiff,

vs.

Bor-Son Construction, Inc., Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company, and Keene Building Products Corporation);

Defendants,

and

Bor-Son Construction, Inc.

Third-Party Plaintiff,

vs.

Corwin, Seppenan and Associates, Inc. and Insulation Sales Company,

Third-Party Defendants.

PLAINTIFF'S RESPONSE TO PETITION FOR WRIT OF PROHIBITION

APPELLATE COURT CASE NO. C3-89-389

TO: THE COURT OF APPEALS OF THE STATE OF MINNESOTA:

Respondent, Independent School District No. 622 (the "School District"), requests this Court deny Petitioner Keene Corporation's Petition for a Writ of Prohibition dated March 2, 1989.

STATEMENT OF FACTS

On February 1, 1989 the Washington County District Court, Judge J. E. Cass, entered an order in response to the School District's Motion to Compel Discovery and Keene's Motion for a Protective Order (see pertinent memoranda, Keene Appendix 11 and 12, and Respondent's Appendix "B", and Transcript of hearing, Respondent's Appendix "A". The Court's Order overruled unsubstantiated claims of privilege and relevance, required complete and non-evasive responses to interrogatories where the requirements of M.R. Civ.P. 33.03 had not been met, and permitted a limited deposition of a Keene counsel legal assistant with regards to the destruction of certain Keene documents.

Despite Keene's assertions, the Trial Court carefully scrutinized its objections, rejecting their propriety as well as the incorrect factual assertions on which they were based. Keene fails to meet its burden of demonstrating a clear abuse of discretion, and its petition should be denied.

BACKGROUND

The School District has brought suite in tort[1] to recover for the removal of toxic asbestos fireproofing in Tartan High School. This suit is similar to many other asbestos property damage claims brought in Minnesota, and hundreds more nationally. Keene is the successor-in-interest and liability to those companies originally manufacturing the fireproofing product in the building (known as "Pyrospray"), and recently discovered documents reveal that Keene itself manufactured the product as well. Keene has steadfastly insisted that it never manufactured asbestos pro-

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[1] Keene's characterization of this action as one seeking economic loss is a boilerplate assertion made by asbestos product manufacturers when defending these cases. To date, nearly 60 trial courts nationally have ruled on this issue, including 3 in Minnesota. See *In Re: State and Regents Building Asbestos Cases*, Nos. 99081, 99082 (Minn. Dist. Dec. 16, 1988)(Carey, J. who has been appointed by the Minnesota Supreme Court to preside over all asbestos cases pending in Minnesota), *Independent School District No. 709 v. W. R. Grace So.*, No. 155716 (Minn. Dist. May 20, 1987)(Litman, J.), and *Federal Reserve Bank v. Carey Canada et al*, Civ. No. 3-86-185 (D. Minn. Aug. 30, 1988)(Devitt, J.). Of these rulings, no Minnesota trial court and only four courts nationally have accepted Keene's position, and each of the four courts doing so has either been reversed on appeal or overruled in a subsequent trial court opinion within that same jurisdiction.

ducts.

Keene Corporation has attempted to utilize its alleged predecessor status as a shield against discovery, asserting that it need only collect the documents of its predecessors in a central location and allow document inspections. Keene admits that its record center contains over 4 million documents, including an unspecified amount of irrelevant material. In response to plaintiff's discovery in this case, Keene has typically provided no more than self-serving responses accompanied by an offer to produce documents at the record center. Keene does not attempt to specify which documents are responsive to individual requests, potentially necessitating a review of each of the 4 million documents in order to obtain a single response. The School District consequently moved the Trial Court for an order compelling proper responses, which was granted on November 21, 1988. The resulting responses from Keene Corporation were similarly vague and non-responsive and continued to improperly direct plaintiff to its 4 million documents in its record center.

The School District also attempted to avoid the review of this vast number of documents (which Keene itself asserts would cost more than the amount of the School District's claim), and consequently served a Request for Production of certain discrete sets of documents in Keene's possession in August, 1988. This Request included:

1. Specific documents from Keene's record center which had been similarly reviewed by and produced to the United States Government in litigation involving similar issues as in this case,

2. Specific documents from Keene's record center or in possession of Keene's counsel which had been produced in litigation with its insurer which also involved issues present in this case,

3. Any documents Keene relied on in preparing responses to discovery in this case,

4. Keene documents which plaintiff had inspected but which were later withheld on claims of privilege and relevance, and

5. An index of documents Keene refused to produce due to alleged privilege.

Keene objected to providing any of these documents.

Further, the School District noted the deposition of Mr. David Rehbein, a paralegal employed by Keene's national counsel who had testified in Keene's insurance litigation that he had destroyed certain Keene documents. The limited purpose of this deposition was to ascertain which documents had been destroyed and why. The deposition was not to require disclosure of any privileged or confidential material.

Keene ultimately moved for a protective order to prohibit Mr. Rehbein's deposition, and the School District similarly moved to compel responses to that discovery subject to the Court's November 21, 1988 Order, as well as the August, 1988 document requests. Both matters were heard on January 12, 1989.

On February 1, 1989, the Court denied Keene's motion, and similarly ordered Keene to respond to plaintiff's discovery, implicitly rejecting Keene's factual assertions which had been disputed by plaintiffs, and overruling Keene's objections.

ISSUES

1. Whether the Trial Court clearly abused its discretion in rejecting claims that certain documents were privileged and/or under seal when the factual basis for these claims was disputed.

2. Whether the Trial Court clearly abused its discretion in overruling Keene's reliance on M.R.Civ.P. 33.03 where it failed to specify the responsive documents and failed to establish that its burden equaled or exceeded that of the School District.

3. Whether the Trial Court erred in allowing a limited deposition of a Keene legal assistant with respect to the destruction of various documents.

REASONS FOR DENYING KEENE'S PETITION

The issuance of an extraordinary writ is improper in this case where the underlying facts of Keene's privilege and burden claims are in dispute, and where the Trial Court determined that Keene's factual claims were incorrect. This is not a case where the Trial Court ignored applicable law as Keene suggests, but

rather one where it applied the law to the facts as it found them. In such a case, this Court should respect the sound judicial discretion of the Trial Court, who scrutinized Keene's assertions and rejected them.

The Court correctly applied M.R.Civ.P. 33.03 and found that Keene's responses did not meet its requirements. The Court had ample basis for concluding that Keene had not adequately specified the responsive documents, and had also failed to meet its burden of proving that the School District's burden was less than or equal to that of Keene.

The Trial Court was also within its discretion in ordering Keene to produce documents which it claimed were under seal when the evidence revealed they were not. The documents produced to the government were merely copies of a specifically defined subset of those documents in Keene's record center, which Keene did not deny would be produced to the School District if it found them independently. Similarly, the evidence supported plaintiff's assertion that the requested insurance litigation documents were actually in the possession of Keene's counsel and/or in its record center. While copies of some may have been under seal (and are not sought by plaintiff), the Court properly ordered disclosure of those not under seal.

The Trial Court further properly ordered the production of documents relied on in preparing Keene's discovery responses, documents which had previously been produced to plaintiff for inspection but were subsequently withheld, and a privilege index to enable a challenge of Keene's privilege claims. Also, the Court did not in any respect allow the discovery of privileged information when it permitted a limited deposition relating to the destruction of various documents.

The history of this litigation has demonstrated that Keene will oppose any type of meaningful discovery, and its responses and objections are drafted with that goal in mind. The Trial Court has overseen nearly 5 years of such tactics, which have required 5 separate motions to compel. The Trial Court was in the best position to evaluate the merit of Keene's factual assertions, and given the evidence produced by the School District, was well within its discretion in rejecting them.

WHEREFORE, Respondent respectfully requests an Order denying the Petition for a Writ of Prohibition.

Dated: March 9, 1989.

Respectfully submitted,

HERTOGS, FLUEGEL, SIEBEN, POLK, JONES & LaVERDIERE, P.A.

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON TENTH JUDICIAL DISTRICT

Independent School District No. 622

Plaintiff,

vs.

Bor-Son Construction, Inc.; Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company and Keene Building Products Corporation),

Defendants,

and

Bor-Son Construction, Inc.

Third-Party Plaintiff,

vs.

Corwin, Steppenan and Associates, Inc. and Insulation Sales Company,

Third-Party Defendants.

File No. C5841701
Property Damage

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO KEENE'S MOTION FOR A PROTECTIVE ORDER

I.

INTRODUCTION

Keene Corporation continues its long-standing tactics to in

response to interrogatory number 37 of plaintiff's third set of interrogatories. Plaintiff served this deposition notice on Keene presuming it would prefer to coordinate the scheduling of an elderly retired employee's deposition with whom plaintiff suspects Keene still has a consulting relationship. If Keene disclaims such relationship and refuses to assist in scheduling the deposition, and if Keene will certify this is still Mr. Wilson's correct address, then plaintiff will happily subpoena him for a deposition at plaintiff's convenience.

B. AS TO THE DEPOSITION OF DAVID REHBEIN AND

C. AS TO THE DEPOSITION OF THE INDIVIDUAL(S) MOST FAMILIAR WITH THE DESTRUCTION AND DISMANTLING OF CERTAIN KEENE FILES

Keene spends the bulk of its memorandum of law arguing against plaintiff's desire to depose Mr. Rehbein. Contrary to what Keene has stated, plaintiff desires to depose Mr. Rehbein on only one narrow, very limited subject area, *to wit*: his involvement with the review, collection, disposal, destruction and dismantling of certain Keene files and records discussed in his August 22, 1984 deposition in the case *Keene Corporation v. I.N.A. et al.*, C.A. 78-1011 (D.D.C.) pages 37-40 and 61-68. Plaintiff does not intend to inquire on a wide array of subjects as Keene apparently fears but rather fully intends to limit its examination to that one area. Thus, Keene's fears about a violation of the attorney client privilege are not well taken.

Plaintiff first learned of Mr. Rehbein's activities as a result of discovery, I.N.A. propounded to Keene after the Rehbein deposition was taken in *Keene v. I.N.A.* (Exhibit J). Since asking this interrogatory in this case, Keene has strenuously opposed Plaintiff's effort to obtain any discovery whatsoever on this particular point.

Plaintiff is entitled to know, *inter alia*, what Mr. Rehbein did in collecting and organizing the documents produced in the insurance litigation, who told him what to do, what they told him to do, who supervised him, how he went about doing it, who participated in those decisions, what evidence was destroyed, and what files were dismantled. Destruction of evidence is highly improper conduct and this court should not allow Keene

to hide behind a hollow plea of attorney client privilege to keep such information from being revealed.

Since Keene has refused to describe the particular passages or produce the Rehbein deposition as sought by plaintiff's interrogatories 1-4 of the plaintiff's third set of interrogatories (Exhibit K), and request for production no. 1 of plaintiff's fourth set of request for production (Exhibit L), plaintiff has sought instead a less desirable alternative -- a limited deposition of Mr. Rehbein. Keene cannot have it both ways; it can't permanently keep Mr. Rehbein silent and hidden away. If Keene will not voluntarily produce its national counsel's personal copy of the Rehbein deposition transcript with exhibits -- which cannot possibly be subject to the protective order -- then this plaintiff should be allowed to pursue limited discovery of Mr. Rehbein about the dismantling and destruction of certain Keene files.

Plaintiff candidly acknowledges that it would prefer to have this court order Keene to produce its counsel's personal copy of the Rehbein transcript and exhibits. By plaintiff's January 4, 1989 motion to compel, plaintiff seeks precisely, this remedy. In fact, plaintiff seeks production of the entire *Keene v. I.N.A.* transcript in that motion. Keene's national law firm, Anderson Russell Kill & Olick, by one of its partners, Mr. Jerold Oshinsky, in the context of other litigation for other clients has openly stated that: "We have the massive Keene record in my office..." (Tr. p. 19, 1.5) *National Gypsum Company v. American Motorist Insurance Company*, CA No. 82-1332, D.D.C. 2/28/84) (Exhibit M).

While parts of the *Keene v. I.N.A.* record are in fact subject to a protective order, this protective order cannot be said to govern a firm's personal copy of that information. This is especially true since the information and documents Keene produced in its insurance litigation came from its New Jersey document repository. This is the same repository to which Keene habitually refers plaintiff for a response to every discovery request propounded. Keene cannot on the one hand invite plaintiff into its document repository and then on the other hand claim privilege to documents so offered. This is criminally contumacious conduct. *Blake Assoc. Inc. v. Omni Spectra Inc.*, 118F.R.D. 283 (D. Mass. 1988). Nor can Keene hide and protect damaging evidence and documents by placing such in the hands of its lawyers. If keene volunteers to this plaintiff access to its documents in its New Jersey warehouse, then it has no grounds whatsoever to claim a protection from disclosure when plaintiff seeks documents from that same original source, but which were ac-

tually produced in another case. This is especially true since an attorney from Keene' national law firm, Mr. Oshinsky, has stated in the context of other litigation on behalf of another client that he has the entire transcript of the *Keene v. I.N.A.* case in his office (Exhibit M).

Keene argues that the deposition and documents plaintiff seeks have no bearing on plaintiff's claims. This contention is not true however. By Keene's own admission, Rehbein's testimony concerns "Keene's claim for punitive damages for bad faith" [Keene memorandum page 6]. A necessary part of this testimony will entail the actions, activities, and special knowledge of Keene *vis a vis* its insurance carrier. Thus, this school district plaintiff and defendant, I.N.A. stand in analogous situations, since both have claimed (for different reasons) that Keene had special knowledge about the harms and hazards of asbestos exposure. I.N.A. has argued this to show superior knowledge lay with Keene and that I.N.A. too was defrauded by Keene's actions and thus should not be responsible for providing insurance coverage under the various policies. This school district plaintiff on the other hand argues Keene's superior knowledge and its failure to warn is one of the reasons it is liable for damages. Unquestionably then, some of the key issues in Keene's insurance litigation are the same as some of the issues in the instant case.

Not all of the documents produced in Keene's insurance litigation are subject to a protective order and thus Keene could easily produce all of the unprotected documents it produced in the insurance litigation. Such documents could easily be copied from Mr. Oshinsky's personal copy of the entire *Keene v. I.N.A.* transcript that he has indicated his firm has. (Exhibit M). Additionally, Keene could produce a privilege index setting forth the identity of those documents to which it now asserts a privilege, or protection under Judge Green's order[1]. Plaintiff believes that Keene should be required to produce such a privilege index for every document it claims is protected from discovery in this case so that a meaningful independent assessment can be made of such claims.

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[1] Judge Green has recently discussed with a Texas state court judge a plan wherein a specially appointed Master in Chancery will proceed to review the entire *Keene v. I.N.A.* transcript for the purpose of selecting relevant documents for production to asbestos personal injury plaintiffs in Texas.

STATE OF MINNESOTA — IN DISTRICT COURT

COUNTY OF WASHINGTON — TENTH JUDICIAL DISTRICT

Independent School District No. 622,

Plaintiff,

vs.

Bor-Son Construction, Inc.; Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company and Keene Building Products Corporation)

Defendants,

and

Bor-Son Construction, Inc.

Third-Party Plaintiff,

vs.

Corwin, Seppenan & Associates, Inc.,

and

Insulation Sales Company,

Third-Party Defendants.

KEENE CORPORATION'S RESPONSE TO PLAINTIFF'S FOURTH SET OF REQUESTS FOR PRODUCTION

File No. C5-84-1701

INTRODUCTION

Keene Corporation ("Keene") has never mined asbestos, nor manufactured, processed, fabricated, sold, distributed, or otherwho

has personal knowledge of the vast majority of the information contained at the document depository. The documents are not sorted by categories. The documents have been made available to plaintiff at Keene's document depository for inspection and copying. See also, Introduction.

4. Produce any and all patent-related documents concerning the product Pyrospray, including but not limited to, a patent-related document from Pearce to Campbell dated August 8, 1970, identified as No. AF005263-67 which was earlier produced for inspection but not copying to counsel for Plaintiff in September of 1987 during his review of Keene's documents in the New Jersey warehouse.

RESPONSE TO REQUEST NO. 4: Documents available in this regard are on file at Keene's document depository in New Jersey and have been made available to plaintiff for inspection and copying. It is Keene's belief that James Campbell, the recipient of No. AF005263-67, was an attorney advising Keene on patent matters. Counsel for Keene is attempting to confirm this information.

5. Produce all documents marked, but not already produced, to Plaintiff's counsel, Charlie Erickson for copying, upon his inspection of documents at Keene's warehouse facility September 21-23, 1987.

RESPONSE TO REQUEST NO. 5: All marked documents were produced with the exception of documents not requested, not relevant to the issues in this action, and no reasonably calculated to lead to the discovery of admissible evidence.

6. Produce an index to every document arguably responsive to any of plaintiff's discovery requests served in this case to which you assert any privilege justifying non-production of the document. This index should include the date of the document, the author addressee, a brief description of the document and the reason purportedly justifying the alleged privilege.

RESPONSE TO REQUEST NO. 6: Keene objects to this request as being unduly burdensome, harassing, or oppressive. Keene objects to this request on the grounds that it is overly broad as to time, scope, or location. Keene objects to this re-

quest on the grounds that it seeks information which is not relevant or is not reasonably calculated to lead to the discovery of admissible evidence.

DATED: September 9, 1988

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Supreme Court, U.S.
FILED
OCT 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-436

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

Keene Corporation,

Petitioner,

--v--

Independent School District No. 622,

Respondent.

PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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APPENDIX

I. Independent School District No. 622 vs. Bor-Son Construction, Inc., et al. No. C5841701 (1989) (Memorandum of Keene Corporation to trial court) [pertinent portions] I-1

J. Independent School District No. 622 vs. Bor-Son Construction, Inc., et al. No. C5841701 (1989) (Affidavit of David F. Herr to trial court) [pertinent portions] J-1

K. Independent School District No. 622 vs. Bor-Son Construction, Inc., et al. No. C5841701 (1989) (Memorandum of Independent School District No. 622 to trial court) [pertinent portions] K-1

No. 89-436

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

Keene Corporation,

Petitioner,

--v--

Independent School District No. 622,

Respondent.

PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

Petitioner Keene Corporation ("Keene") submits this reply brief in further support of its petition for a writ of certiorari granting review of a Minnesota State Court decision requiring Keene to produce documents in state court litigation that are absolutely privileged and that are also under federal court seal. Respondent Independent School

District No. 622 ("Respondent") incorrectly contends that Keene failed to preserve its due process claim and that there is no need for this Court to review what Respondent mischaracterizes as an interlocutory discovery dispute in state court. Keene did raise and preserve both its supremacy clause claim and its due process claim. Moreover, the issue presented is whether a state court can order a party to produce documents disclosing attorney-client and work product privileges, particularly when many of such documents were created in reliance on a federal court protective order and when the ordered disclosure would violate that party's constitutional right to effective counsel.

The order at issue directed Keene to produce "any and all documents, exhibits

or depositions utilized by any party in the case of Keene Corporation v Insurance Company of North America" ("the INA case"). See App. A. In the INA case, Keene had sought insurance coverage for asbestos-related cases. During the damage phase of that litigation, Keene had to explain and justify the steps taken by its defense counsel in its national defense of those cases. Keene remains a defendant in asbestos cases. Production of such material to an insurance carrier, which had already been held liable for coverage, did not waive the attorney-client or work product privileges because the policy holder and the insurance carrier then had a common interest. See, e.g., Eureka Investment Corp. v. Chicago Title Ins. Co., 743 F.2d 932, 936-37 (D.C. Cir. 1984). The

federal court signed a protective order, placing the material produced in the damage phase under seal and limiting the use of that material to the conduct of the INA case. In reliance on that federal protective order, Keene produced correspondence among its defense counsel and permitted certain lawyers and a paralegal to be deposed on trial and litigation strategy. It is the application of the state court's order to that absolutely privileged material that caused Keene to file this petition.

Keene maintains that its constitutional right to effective counsel and access to the courts will be irreparably harmed if Keene is forced to disclose its trial and litigation tactics as required by the state court order. Keene also maintains that the state court order compels it to

violate a federal order and that the consequence of such a violation will be to seriously affect the ability of federal courts to obtain evidence in future cases.[1]

Keene told the state courts that court ordered production of the documents at issue, which disclosed attorney-client and work product privileges, would violate Keene's constitutional right to effective counsel and access to the courts. At the trial level Keene told the Court:

> The release of this information would deprive Keene Corporation of its rights to an adequate and true defense under the Minnesota and

[1] Keene seeks relief from this Court in light of the statements by the federal district court for the State of Minnesota, which dismissed a civil rights action by Keene, in part, in reliance upon Keene's right to petition this Court for relief.

United States Constitutions. See App. J.

Keene repeated its constitutional due process claim to the Minnesota Court of Appeals. See App. G-4. Having stated "the claim of invalidity and the ground therefor" to the state courts, Keene properly presented the federal question below and this Court has the jurisdictional powers to review that decision. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

The state court's discovery order that Keene produce these privileged documents "is a final judgment for purposes of [this Court's] jurisdiction, since it involved a right 'separable from, and collateral to' the merits." National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 44 (1977), citing Cohen v. Beneficial Loan Corp., 337 U.S.

541, 544 (1949). Resolution of the matters raised by Keene in this petition are collateral to and will not affect the merits in the underlying state court proceeding.

More importantly, if Keene is not granted federal review it will irreparably lose any remedy for the deprivation of its constitutional rights. The judicial process cannot repair the damage done once privileged material is disclosed. Bogosian v. Gulf Oil Corp., 738 F.2d 587, 591 (3rd Cir. 1984) (compliance with a disclosure order destroys the right to be protected). Keene has asked the highest state court to protect its constitutional right to counsel and been rebuffed. The irreparable harm it will suffer will occur when the material is produced and

will not be dependant upon the ultimate result of the state court litigation. Accordingly, this Court has the power to review that decision now. - Pennsylvania v. Ritchie, 480 U.S. 39 (1987); Cohen v. Beneficial Life, 337 U.S. at 546.

Keene is arguing that the privileged status of information contained in the documents it has been ordered to produce is the reason that compelled production of these documents will violate its constitutional right to counsel. The state court order directs Keene to provide its defense strategy in asbestos cases to this asbestos plaintiff, effectively destroying Keene's constitutional right to counsel. If need be, this Court can review the evidence in the state court record to determine if the documents are privileged, since the

conclusion of law as to a federal right and the findings of fact are so intermingled. See Fiske v. Kansas, 274 U.S. 380, 385 (1927). Indeed, this Court has said:

> [w]hen the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained.

Hooven & Allison Co. v. Evatt, 324 U.S. 652, 659 (1945), overruled on other grounds, Limbach v. Hooven & Allison Co., 466 U.S. 353, 361 (1984). A finding as to whether or not the documents at issue disclosed privileged information is similarly determinative of whether the

state court order compelling their production violates Keene's due process rights. Moreover, the uncontroverted evidence below established that the contents of the documents contain privileged information.

Thus, Keene told the state trial court that the INA case focused on the nature and quality of Keene's defense in asbestos cases. See App. F. Keene also told that court that a deposition transcript ordered produced "discussed details of the management and adequacy of Keene's defense in asbestos-related litigation" and that the documents made exhibits to that deposition "consist almost exclusively of memoranda and correspondence among Keene, the attorneys defending Keene, and Keene's insurers, related to the handling of Keene's

defense in asbestos-related litigation." See App. I. Keene also stated that it would not have permitted the deposition to occur but for the federal court order and that defense counsel for Keene believes that disclosure of this information related to the nature of Keene's defense would impair counsel's efforts to defend Keene. See App. J.

Respondent never contested the validity of the privilege claims asserted by Keene. Nor did Respondent suggest that the privilege had been waived. Instead, in opposing Keene's writ to the Minnesota Court of Appeals, Respondents merely argued that compelled production of these privileged documents would not violate the federal court order because Respondent sought copies of the sealed documents from Keene. See App. K. But,

Keene never argued that those documents, or any documents, became privileged when they were produced pursuant to the protective order.[2] Rather Keene is arguing that the documents are privileged based on the attorney-client and work product material they disclose. This conforms to the terms of the federal protective order provision, which state that the documents govern questions of privilege.

Thus, the evidence in the record shows that Keene established that the documents it has been ordered to produce disclose confidential attorney-client

[2] The protective order permitted the documents to be produced without losing their privileged status, and in reliance on that protective order Keene permitted its counsel to be deposed, thus creating additional privileged and confidential documents.

communications and counsel's trial preparation materials. Accordingly that order violates Keene's constitutional due process right, as a civil litigant, to the assistance of counsel. See Maness v. Meyers, 419 U.S. 449, 471-72 (1975) (Stewart, J., concurring); Powell v. State of Alabama, 287 U.S. 45, 69 (1932).

The right to counsel in civil cases rests on the principle that, without the assistance of counsel, the constitutional guarantee of a fair hearing may be rendered meaningless. See Powell v. Alabama, 287 U.S. at 68. See also Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (right to be heard of little avail if it does not comprehend right to be heard by counsel).

The order which demands the production of these materials is tantamount to

compelling an attorney to testify as to how the attorney prepared the case. The subject of the depositions at issue is the handling of Keene's defense in asbestos related litigation. The witnesses discuss communications between Keene and its counsel, communications among counsel, defense strategy sessions and the role of Keene's national defense counsel, including the organization and handling of the many asbestos cases, case evaluations and settlement negotiations. The protection of the matters addressed in the coverage action depositions from discovery by adverse parties is at the heart of the attorney-client privilege and the attorney work-product doctrine. If Keene's confidences and its attorneys' strategy discussions were subject to discovery by adverse parties in the many

asbestos cases, counsel could not possibly provide effective representation to its clients. Similarly, if the coverage action materials at issue here are to be produced to plaintiffs in the underlying cases, Keene faces a draconian choice: it can either abandon its efforts to obtain insurance coverage and the means to pay for its defense in the underlying tort cases, or it can risk rendering its defense attorneys impotent by publishing through public discovery their communications, strategies and thought processes.

Respondent's attempt to obtain privileged documents also constitutes an impermissible interference with Keene's constitutional right of access to the courts. The right of access to the courts is based in the due process

clause. Ryland v. Shapiro, 708 F.2d 967, 972 (5th Cir. 1983). It is basic to our system of government and is one of the fundamental rights protected by the Constitution. Id. at 971. This court has characterized this right in the following language:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . .

Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 148 (1907). Consequently, this right is deserving of "rigorous protection." Martin v. Lauer, 686 F.2d 24, 33 (D.C. Cir. 1982).

A mere formal right of access to the courts does not pass constitutional muster. Id. Courts require that the

access be "adequate, effective, and meaningful." Bounds v. Smith, 430 U.S. 817, 822 (1977).

Keene also maintains that production of these privileged documents will cause it to violate the federal order. The federal court issued an order limiting use of information obtained by discovery to the conduct of that case. In reliance on that order, Keene produced privileged documents and permitted its counsel to reveal trial strategy at deposition, thus creating deposition transcripts of privileged material which would not have existed but for the protective order. The federal court recently refused to lift the seal on these materials. See App. I. Even if the seal were lifted they would remain privileged. The state court order directs Keene to give this

privileged and sealed material to Respondent for a use not contemplated by the federal order. If a state court may rip the federal seal off material produced in reliance on a federal order, then federal courts will not be able to obtain evidence in future cases by offering a protective order.

Federal courts have a vital interest in the enforceability of protective orders, because witnesses will be inhibited from giving vital evidence if they believe the orders will not be enforced. See Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 295-96 (2d Cir. 1979). The state court order directs Keene to produce to Respondent depositions created in reliance on the Federal protective order. Such an order directly affects the power of federal

courts to control the evidence available to them and, as such, is an impermissible intrusion into the federal court jurisdiction.

CONCLUSION

For the reasons set forth herein, and in the prior petition, Petitioner Keene prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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STATE OF MINNESOTA DISTRICT COURT
COUNTY OF WASHINGTON
TENTH JUDICIAL DISTRICT

Independent School District No. 622,

Plaintiff,

File No. C5841701

Property Damage

vs.

Bor-Son Construction, Inc.; and Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company and Keene Building Products Corporation),

Defendants,

and

Bor-Son Construction, Inc.,

Third-Party Plaintiff,

vs.

Corwin, Seppenan and Associates, Inc. and Insulation Sales Company,

Third-Party Defendants.

KEENE CORPORATION'S MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

INTRODUCTION

Keene Corporation ("Keene") brings this motion for a protective order against a set of burdensome and inappropriate discovery requests served by plaintiff. Plaintiff served seven notices of deposition on or about December 20, 1988. These notices purported to require Keene to produce witnesses and documents on three days' notice and to produce large numbers of documents that have previously been produced or made available to plaintiff's counsel. All of the discovery requests essentially duplicate requests previously served and responded to in this litigation. In addition to five depositions of Keene noticed as "Rule 30(b)(6)" depositions under the

Federal Rules of Civil Procedure[sic],[1] plaintiff noticed the deposition of David Rehbein, a legal assistant employed by Keene's national defense counsel. Each of these deposition notices was accompanied by a request for production of documents similarly purporting to require Keene to produce voluminous records on three-days' notice. All of these deposition notices should be quashed and a protective order should be entered preventing the taking of these depositions.

Plaintiff has also noticed the deposition of Harry Wilson. Wilson is a former employee of a former subsidiary of

[1]Keene assumes these notices all intend to invoke Rule 30.02(6) of the Minnesota Rules of Civil Procedure, renumbered by amendment effective January 1, 1989, to Rule 30.02(f). Throughout this brief, Keene will simply refer to this rule as Minn. R. Civ. P. 30.02(f).

Keene, and is not under Keene's control and Keene cannot produce him for his deposition.

Keene has agreed to produce a witness to testify regarding the document center maintained by Keene. This deposition should be unnecessary, however, for Plaintiff's counsel has previously deposed Howard Mileaf, Keene's Vice President, Corporate Secretary, General Counsel and custodian of records. Mr. Mileaf would be the witness Keene would designate to testify on this subject.[2]

FACTUAL BACKGROUND

Keene has never mined asbestos, nor manufactured, processed, fabricated,

[2]Mr. Mileaf was deposed by plaintiff's counsel in University of South Carolina v. W.R. Grace & Co., et. al., Court of Common Pleas, Richland County, South Carolina, on March 13, 1987.

sold, distributed or otherwise placed into commerce thermal insulation or acoustical products containing asbestos. A former subsidiary of Keene, Keene Building Products Corporation ("KBPC"), and KBPC's corporate predecessors, Baldwin-Ehret-Hill, Inc. ("BEH"), a Pennsylvania corporation, Ehret Magnesia Manufacturing Company ("Ehret"), a Pennsylvania corporation, and Baldwin-Hill Company ("B-H"), a New Jersey corporation, did at one time manufacture and sell thermal insulation or acoustical products containing asbestos. Keene expressly denies that it is the successor to the unknown and unforeseen contingent tort, contractual, or other liabilities of KBPC, BEH, and BEH's corporate predecessors.

Many of the facts underlying this discovery dispute have been before the Court on prior occasions. Virtually all of the current requests have been the subject of previous requests. The chart appended to this brief as Appendix A catalogs these previous requests. Plaintiff's attempts to renew these requests again by requests which are untimely under the final discovery cutoff in the litigation should be rejected. Plaintiff seeks to impose a discovery burden on Keene that is not only burdensome, but is actually impossible fcr Keene to perform. The bulk of plaintiff's discovery requests are directed to the activities of Keene's former subsidiary or that subsidiary's alleged predecessors. Keene cannot be required to produce a witness to testify

on the various subjects designated by plaintiff in its "30(b)(6)"[sic] deposition notices because Keene does not employ any witness from its former subsidiary who can so testify.

ARGUMENT

I. THIS COURT MUST SUPPRESS DISCOVERY ON THE INSURANCE COVERAGE DISPUTE.

Plaintiff's discovery requests are directed, in large part, to discover information from a discovery dispute between Keene and its liability insurers relating to coverage for certain personal injury claims. That action is pending in the United States District Court for the District of Columbia, and the various records and testimony plaintiff now seeks were placed under seal by that court. The protective order sealing these records, dated March 30, 1984, is

attached to the Affidavit of Mary R. Vasaly as Exhibit A.

This Court should grant Keene a protective order against the discovery of information relating to the insurance coverage issues for the following reasons:

(a) The information sought is subject to the federal court's seal, and plaintiff should go to that Court if it wants relief from the order;

(b) The information sought by plaintiff is in any event subject to attorney work product immunity and the attorney-client privilege;

(c) Keene relied on the federal court's protective order when it allowed depositions to proceed which addressed attorney-client communications and attorney work product information and

documents; had there been no protective order, Keene would have asserted its privileges to prevent these depositions from proceeding;

(d) The information sought by plaintiff relates solely to Keene's bad faith claims against its insurers in the federal court action and have no bearing on the facts relevant to plaintiff's claims against Keene in this action; and

(e) The Minnesota Rules of Civil Procedure do not allow discovery of the information sought by plaintiff.

Keene filed its insurance coverage action in June of 1978. Insofar as Keene is concerned, the action was substantially resolved by the May 13, 1983, decision of the federal court. Keene Corp. v. Insurance Co. of N. Am., No. 78-1011-JLG, slip op. (D.D.C.

May 13, 1983). That decision is Exhibit B to the Affidavit of Mary R. Vasaly. Keene's claims for punitive damages based on bad faith were resolved in 1984, by settlement, on the eve of trial.

Plaintiff's attempt to obtain access to documents relating to the federal court litigation should be addressed to the federal court. Plaintiff is undoubtedly seeking to "end run" the federal court judge because of that judge's recent ruling declining to modify the protective order to allow discovery of materials in the insurance coverage action for use in personal injury cases. Indeed, the first request for these materials in this litigation came three weeks after the entry of that order, and after this

action had been pending for years.[3] This court should not provide a forum to plaintiff and its counsel to seek a more favorable ruling. It is entirely proper to require plaintiff to seek relief from the federal court in Washington. In her July 8, 1988, decision, Judge Green implicitly acknowledges that she would entertain a request to intervene to have the question of non-parties' rights to access to the documents decided.

Solely in connection with Keene's claims for punitive damages for bad faith, Mr. David Rehbein was deposed by the insurers

[3]Plaintiff served interrogatories and requests for production of documents on or about July 31, 1988, seeking much of the information now sought by "30(b)(6)" deposition notice and accompanying Rule 34 requests for production of documents. Those requests were timely responded to by Keene. The requests and responses are attached to the Affidavit of Mary M. Vasaly as Exhibits G, H, I & J.

in August and September 1984. At the time of his deposition, Mr. Rehbein was (and still is) employed by Anderson Russell Kill & Olick (hereafter "ARKO"). See the Affidavit of Howard A. Mileaf filed in the federal court action (hereafter "Mileaf Aff." at ¶ 6), attached as Exhibit E to the Affidavit of Mary A. Vasaly. ARKO served (and still serves) as Keene's national defense counsel in asbestos-related litigation, and Mr. Rehbein's duties at ARKO have consisted largely of acting as the administrator for the defense of the asbestos-related litigation involving Keene. Mileaf Aff. at ¶ 6. At his deposition, Mr. Rehbein discussed details of the management and adequacy of Keene's defense in asbestos-related litigation. Mileaf Aff. at ¶ 6. Thus, Mr. Rehbein's

deposition testimony concerns absolutely privileged matters concerning Keene's defenses against suits such as this, which plaintiff has no right to discover under the Minnesota Rules of Civil Procedure.[4] This discovery can only be viewed as harassment.

Similarly, the documents which were made exhibits to Mr. Rehbein's deposition consist almost exclusively of memoranda and correspondence among Keene, the attorneys defending Keene, and Keene's insurers, related to the handling of Keene's defense in the asbestos-related

[4]Minnesota provides for only limited discovery of information relating to insurance coverage. Under Minn. R. Civ. P. 26.02(2), plaintiff is entitled to know the limits of insurance coverage. Here, nothing but the result of the federal court litigation--the adjudication that Keene is entitled to insurance coverage under various policies--is germane or relevant in any way to the issue for which this limited discovery is allowed.

litigation. Mileaf Aff. at ¶ 7. Accordingly, these documents are protected from disclosure by the attorney-client privilege and work product immunity. Further, these documents were generated many years after the period when Keene's former subsidiary, KBPC, manufactured products containing asbestos. These documents never were part of the business records of Keene or KBPC. Mileaf Aff. at ¶ 7.

Additionally, Keene would not have allowed Mr. Rehbein to provide testimony concerning privileged communications and documents, without securing the protective order that plaintiff now seeks to have lifted. See Mileaf Aff. at ¶ 8. It was only because of the nature of Keene's claims in the insurance coverage litigation, and the acknowledgement by

all parties and the presiding judge in that case that the information to be disclosed would be kept in strict confidence, that Keene allowed Mr. Rehbein to testify. Keene relied on the protective order and is entitled to its protection. Counsel defending Keene in asbestos-related litigation believes that any revelation of information related to the nature of Keene's defense would impair counsel's efforts to defend Keene. See Affidavit of David F. Herr (copy attached as Exhibit F to the Affidavit of Mary R. Vasaly).

A. The Documents and Deposition Testimony Sought Are Privileged Because They Are Attorney Work Product and Are Protected by the Attorney-Client Privilege

The March 30, 1984, protective order entered by the federal court allowed the exchange of documents and information between Keene and its insurers which otherwise are protected from disclosure by the work-product doctrine and the attorney-client privilege. This information and these documents simply are not properly subject to discovery by plaintiff under Rule 26.02 of the Minnesota Rules of Civil Procedure.

Plaintiff seeks to depose Mr. Rehbein about his prior sealed deposition and to examine the documents which were made exhibits to Mr. Rehbein's testimony in that sealed deposition. This discovery must be denied because of the court order

sealing the material and because the information sought addresses the management and details of Keene's defense in the underlying personal injury asbestos-related litigation, including cases such as this one. Specifically, these documents concern the mental impressions of the attorneys defending Keene. Plaintiff's request to depose Mr. Rehbein and to obtain information about the Coverage Action is an unprecedented and flagrant attempt to invade Keene's attorney-client privilege and to obtain work-product and trial preparation materials.

Moreover, as a member of Keene's litigation team employed by Keene's counsel, Mr. Rehbein may not be deposed by Keene's litigation adversaries, absent

Keene's consent.[5] Keene does not consent. In N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83 (M.D.N.C. 1987), the court granted an order preventing the deposition of a party's attorney. Because of the risk of disruption and controversy over issues of attorney-client privilege and work product, the court found that "the mere request to depose a party's attorney constitutes good cause for obtaining a Rule 26(c), Fed. R. Civ. P., protective order unless the party seeking the deposition can show both the propriety and need for the deposition." 117 F.R.D.

[5]The protections afforded by the attorney-client privilege and the attorney work product doctrine are not lost over time, and remain applicable in subsequent litigation. See Carey Canada, Inc. v. California Union Ins. Co., 118 F.R.D. 242, 246-47 (D.D.C. 1986), citing Federal Trade Comm'n v. Grolier, 462 U.S. 19, 25 (1983).

at 85. The plaintiff can show neither in this case, and Keene is accordingly entitled to the protective relief it seeks.

Where documents and information relating to a policyholder's defense in claims against it are disclosed by a policyholder to its insurers, they are disclosed based on the common interest of the policyholder and its insurers in the defense of underlying claims against the policyholder. Here, plaintiff is not even the underlying tort claimant involved in that coverage litigation, so its interest in the material sought is even more remote. See, e.g., Eureka Investment Corp. v. Chicago Title Ins. Co., 743 F.2d 932, 936-37 (D.C. Cir. 1984); see also Car & Gen'l Ins. Co. v. Goldstein, 179 F. Supp. 888, 891

(S.D.N.Y. 1959), aff'd, 277 F.2d 162 (2d Cir. 1960), where the court stated that "the insurance company and insured have a common interest in the defense of suits against the insured."

Thus, a policyholder's disclosure to its insurers of privileged documents and information does not vitiate attorney work product immunity and the attorney-client privilege as to underlying tort claimants, such as plaintiff. See Independent Petrochem. Corp. v. Aetna Casualty & Sur. Co., 654 F. Supp. 1334, 1365 (D.D.C. 1986), where the court stated that documents relating to the policyholder's defense in underlying claims which were discoverable by the policyholder's insurers nonetheless could retain their status as documents privileged from discovery by underlying

tort claimants. See also United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1300-01 (D.C. Cir. 1980). In that case, the Circuit Court for the District of Columbia vacated an order allowing discovery of documents protected by attorney work product immunity, which had been shared by the party claiming protection with a party that had common interests. Since Mr. Rehbein was and is an employee of Keene's national defense counsel who has been intimately involved in the management of Keene's defense in asbestos litigation, his deposition testimony, and the exhibits thereto, are privileged from disclosure based on attorney work product immunity and the attorney-client privilege.

B. Keene Relied on a Protective Order in Allowing Mr. Rehbein to be Deposed

As set forth above, Mr. Rehbein is an ARKO employee intimately involved in assisting Keene's attorneys in Keene's defense of asbestos-related litigation. See Mileaf Aff. at ¶ 6. As also shown, Keene would not have allowed Mr. Rehbein to testify concerning the conduct of Keene's defense and to produce the subject documents, absent a protective order covering his deposition and the exhibits to it. Mileaf Aff. at ¶ 8. Keene's justifiable reliance on the protective order in allowing Mr. Rehbein to testify as he did provides even more support for denying plaintiff's motion. See, e.g., Tavoulareas v. Washington Post Co., 111 F.R.D. 653, 658 (D.D.C. 1986) ("Tavoulareas").

In Tavoulareas, the defendant sought to lift a protective order pursuant to which

it had received voluminous discovery, without objection. In denying the motion with respect to documents not made a part of the public record at trial, the Tavoulareas court emphasized the fact that much of the discovery sought to be unsealed had been provided in reliance on the protective order:

> The Court must consider the fact that Mobil's cooperation in this process was obtained in reliance upon the blanket protective order, which included a requirement that the information be used only in preparation for litigation.

111 F.R.D. at 658-59. The Court found such reliance to be a "significant factor in determining whether to lift a seal on discovery materials." Id. at 659 (citations omitted). See also Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 295 (9th Cir. 1979), where the

court stated:

> Unless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences.[6]

This point also is demonstrated by H.L. Hayden Co. of N.Y. v. Siemen Med'l Sys., Inc., 106 F.R.D. 551 (S.D.N.Y.), aff'd in part and dismissed in part, 797 F.2d 85 (2d Cir. 1985) ("Hayden"). In Hayden, the court denied a motion to modify a protective order, on multiple grounds,

[6]Martindell distinguished Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326 (9th Cir. 1977), which vacated a lower court judgment rendered on a motion made by nonparties who had not expressly been granted leave to intervene, based on the fact that the party who might have opposed the nonparties' motion in Spangler had not had the opportunity to oppose the motion.

one of which was the parties' reliance on the order:

> The defendants' reliance on the protective order is also significant. The defendants proceeded with discovery under the expectation that the materials they disclosed would be used only for purposes of this lawsuit. The protective order facilitated a discovery process which the plaintiffs in their papers have described as 'extensive and painstaking.' The order was utilized to secure 'the just, speedy, and inexpensive determination,' Fed. R. Civ. P. 1, of an expensive, protracted and often bitter dispute.

Id. at 556. The federal court issuing the protective order recognized the importance of Keene's right to confidentiality in denying the motion to modify the protective order brought last summer. Keene's reliance on the protective order in allowing Mr. Rehbein

to testify requires this court to deny plaintiff the discovery it now seeks.

C. The Deposition Testimony and Documents Sought Have No Bearing on Plaintiff's Claims

None of the issues to be litigated in this case is the same as any issue in the insurance coverage litigation. The deposition testimony and documents sought simply have no bearing on this action.

As stated above, this action is a product liability action for property damage relating to an alleged thermal insulation product containing asbestos. The action in which the information sought by plaintiff was produced, by contrast, involved Keene's efforts to force insurance companies to honor their insurance contract obligations and for breach of their duties. That coverage

action was not even filed until 1978--long after Keene's former subsidiary had ceased manufacturing products that contained asbestos. The information plaintiff seeks addresses the bad faith of Keene's insurers and the handling and adequacy of Keene's defense in asbestos-related litigation; it does not address issues to be proved in this action. Thus, the documents and evidence which plaintiff seeks are neither necessary nor relevant to the points which plaintiff would need to make to prevail in this action.

* * *

Dated: January 5, 1989.

Respectfully submitted,

MASLON EDELMAN BORMAN & BRAND

By /s/ Mary R. Vasaly
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ATTORNEYS FOR DEFENDANT
KEENE CORPORATION

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF WASHINGTON
TENTH JUDICIAL DISTRICT

Independent School District No. 622,

Plaintiff,

vs.

Bor-Son Construction, Inc.; and Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company and Keene Building Products Corporation),

Defendants,

and

Bor-Son Construction, Inc.,

Third-Party Plaintiff,

vs.

Corwin, Seppenan and Associates, Inc. and Insulation Sales Company,

Third-Party Defendants.

File No. C5841701

Property Damage

AFFIDAVIT OF DAVID F. HERR RELATING TO MOTION FOR PROTECTIVE ORDER

STATE OF HAWAII)
)ss.
COUNTY AND CITY OF HONOLULU)

David F. Herr, being first duly on oath sworn, deposes and states that:

1. I am an attorney at law and a partner in the Minneapolis law firm of Maslon Edelman Borman & Brand. I am one of the attorneys for defendant Keene Corporation in this action.

2. I am informed and believe that the action Keene Corporation vs. Insurance Corporation of North America, Civil Action No. 78-1011, United States District Court for the District of Columbia ("Coverage Action") is an action to determine the existence and extent of liability insurance coverage for Keene Corporation for asbestos-related claims. I further understand that David Rehbein, a legal assistant with Keene's national

defense counsel, was deposed in the Coverage Action, that his deposition was sealed by Order of the Court, and that the previously-sealed deposition of David Rehbein may contain information concerning the nature of the defense strategy of Keene Corporation, the mental impressions of Keene Corporation's counsel, and other privileged information.

4. To allow plaintiff in this action to obtain such information, other sealed information, or to depose Mr. Rehbein to obtain substantially the same information would substantially impair my efforts in defending Keene Corporation in this action and it other cases. The release of this information would deprive Keene Corporation of its rights to an adequate and true defense under the Minnesota and

United States Constitutions. The disclosure of this type of information would undermine my effectiveness in defending Keene Corporation and would make it more difficult for me to provide the defense Keene Corporation is entitled to.

Further your affiant sayeth naught.

/s/ David F. Herr
David F. Herr

Subscribed and sworn to before me this 5th day of January, 1989.

/s/
Notary Public, State of Hawaii

My Commission expires: 2/18/89

STATE OF MINNESOTA IN DISTRICT COURT
COUNTY OF WASHINGTON
TENTH JUDICIAL DISTRICT

ASBESTOS/PRODUCT LIABILITY

Independent School District No. 622,

File No.: C5-84-1701

Plaintiff,

vs.

MEMORANDUM IN OPPOSITION KEENE'S PETITION FOR WRIT OF PROHIBITION

Bor-Son Construction, Inc., Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company, and Keene Building Products Corporation),

Defendants,

and

Bor-Son Construction, Inc.,

Third-Party Plaintiff

vs.

Corwin, Seppanan and Associates, Inc. and Insulation Sales Company,

Third-Party Defendants.

TO: THE COURT OF APPEALS OF THE STATE OF MINNESOTA

Respondent, Independent School District No. 622 (the "School District"), submits this memorandum in opposition to defendant Keene's Petition for a Writ of Prohibition in order to restrain enforcement of a Washington County District Court Order dated February 1, 1989.

* * *

It is clear from the facts that Keene's true objection is that it does not wish to allow the School District to make use of the labors of the government in order to make meaningful discovery in this case possible. It is undisputed that the School District could obtain copies of those exact documents so long as it would

find them through its own efforts at Keene's record center. Keene's objection was appropriately stricken by the Trial Court.

2. Documents produced in the case of Keene Corporation v. Insurance Co. of North America, C.A. No. 78-1011 D.C.

Similar to the Government litigation, Keene has been involved in litigation with its insurer over whether it should afford coverage for asbestos claims. The insurer has denied coverage, asserting among other things, that Keene was insuring a known liability and knew at the time that it would be collecting on the policies. Once again, the case involves issues such as Keene's knowledge, concealment, state of the art, etc. While certain documents in that case are under seal (and are not sought

by the School District), Keene's national counsel has a personal copy of a full transcript of the proceedings in his office which is by no means under seal (see page 15, infra). Further, to the extent the documents produced by Keene in the insurance litigation came from the record center, Keene is not prevented in any way from disclosing them. The Court did not order production of any materials which are under seal, and properly rejected Keene's objections.

3. Documents previously produced to plaintiff's counsel for inspection at the record center.

In September, 1987, School District counsel went to Keene's record center with the purpose of reviewing sales records and other limited types of

documents. Plaintiff's counsel was not permitted to

* * *

Dated: March 9, 1989.

Respectfully submitted,

HERTOGS, FLUEGEL, SIEBEN, POLK, JONES & LaVERDIERE, P.A.

By /s/ Michael R. Strom
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